

Hearing Date and Time: July 30, 2013 at 10:00 a.m.
Objection Deadline: July 26, 2013 at 12:00 p.m.

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	
)	Chapter 11
)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u>)	Case No. 12-12020 (MG)
)	
Debtors.)	Jointly Administered
)	

**ALLY FINANCIAL INC.'S
OBJECTION TO THE AD HOC GROUP OF JUNIOR
SECURED NOTEHOLDERS' MOTION FOR ENTRY
OF AN ORDER (I) DIRECTING EACH OF DEBTORS'
COUNSEL, INCLUDING MORRISON & FOERSTER LLP,
OFFICIAL COMMITTEE COUNSEL, INCLUDING KRAMER
LEVIN NAFTALIS & FRANKEL LLP, AND THE DEBTORS'
MANAGEMENT TO REMAIN STRICTLY NEUTRAL IN ANY
DISPUTE REGARDING CLAIMS BY AND BETWEEN ANY
DEBTORS, (II) ORDERING THE LIMITED DISQUALIFICATION
OF EACH OF THE FOREGOING TO THE EXTENT NECESSARY
TO EFFECTUATE THE FOREGOING, AND (III) GRANTING RELATED RELIED**

TO THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE:

Ally Financial Inc. on behalf of itself and its non-debtor subsidiaries, including Ally Bank, (collectively, "**Ally**") files this objection (the "**Objection**") to the *Motion of the Ad Hoc Group of Junior Secured Noteholders for Entry of an Order (i) Directing Each of the Debtors' Counsel, Including Morrison & Foerster LLP, Official Committee Counsel, Including Kramer Levin Naftalis & Frankel LLP, and the Debtors' Management to Remain Strictly Neutral in any*

Dispute Regarding Claims By and Between any Debtors, (ii) Ordering the Limited Disqualification of Each of the Foregoing to the Extent Necessary to Effectuate the Foregoing, and (iii) Granting Related Relief [ECF No. 4289] (the “**DQ Motion**”).¹

PRELIMINARY STATEMENT²

1. The DQ Motion is a transparent attempt by the Ad Hoc Group of Junior Secured Noteholders (the “**Ad Hoc Group**”) to gain a perceived strategic and tactical advantage to collaterally attack a chapter 11 plan [ECF No. 4153] (the “**Plan**”) rather than object to the Plan on the merits. Notably, the Ad Hoc Group is taking this action despite the fact that the Plan contemplates that the Ad Hoc Group will be paid in full on the effective date of the Plan, including accrued prepetition interest plus any postpetition interest to which the Court determines the Ad Hoc Group are entitled.³ There is little doubt that the DQ Motion was filed to attempt to maximize negotiation leverage by making the dispute with the Debtors with respect to the Ad Hoc Group’s entitlement to postpetition interest as expensive and disruptive as possible. Moreover, the DQ Motion, if granted, would bring the Debtors’ chapter 11 cases to a halt and destroy the settlement embodied in the Plan.

2. Ally now files this Objection to address the central arguments asserted in the DQ Motion. *First*, the DQ Motion is not timely. After signing a plan support agreement prepetition under which they received similar treatment, more than a year after the Debtors’ counsel retained under section 327(a) of the Bankruptcy Code (“**Debtors’ Counsel**”) and counsel to the Committee (“**Committee’s Counsel**”) were retained, and after this Court approved the Plan

¹ Capitalized terms used but not defined herein have the meanings ascribed to such terms in the DQ Motion.

² Ally joins in the arguments set forth in the objections to the DQ Motion filed by the Debtors and the statutory committee of unsecured creditors (the “**Committee**”), filed substantially contemporaneously with this Objection.

³ See Plan, Art. III.D.

Support Agreement (the “*PSA*”), rather than challenge the Plan on the merits, the Ad Hoc Group has chosen to challenge the Debtors’ Counsel’s and the Committee’s Counsel’s roles as fiduciaries of the Debtors’ estates for tactical reasons. *Second*, the assertion that a conflict exists with respect to the actions of Debtors’ Counsel, Committee’s Counsel, or Mr. Kruger, as CRO of all the Debtors, is incorrect, dependent on matter-of-fact statements, and unsupported by any evidence. *Third*, even if a conflict is found to exist despite the lack of evidence, it fails rise to the level necessary for disqualification.

ARGUMENT

I. The DQ Motion Is Not Timely.

3. The Ad Hoc Group has been aware of the Intercompany Claims for over a year—the decision to pursue disqualification now is untimely and indicates that the DQ Motion was filed for tactical reasons. *See Lamborn v. Dittmer*, 873 F. 2d 552 (2d Cir. 1989) (“[C]ourts must guard against tactical use of motions to disqualify counsel ...”) (internal citations omitted); *In re Wingspread Corp.*, 152 B.R. 861, 863 (Bankr. S.D.N.Y. 1993) (“Motions to disqualify attorneys are general disfavored and are subject to fairly strict scrutiny to ensure that they are not being interposed for merely tactical reasons.”). The retention applications for counsel to the Debtors and the Committee were approved approximately one year ago.⁴ Further, each Debtor filed its Statement of Assets and Liabilities listing, among other things, all of its Intercompany Claims, on June 30, 2012.⁵ The Ad Hoc Group also signed a plan support agreement prepetition and was aware of and had their counsel participate in the five-month mediation that ultimately culminated

⁴ *See Order Authorizing the Retention and Employment of Morrison & Foerster LLP as Bankruptcy Counsel to the Debtors Nunc Pro Tunc to the Petition Date* [ECF No. 786]; *Order Approving Retention of Kramer Levin Naftalis & Frankel LLP as Counsel to the Official Committee of Unsecured Creditors, Nunc Pro Tunc to May 16, 2012* [ECF No. 777]

⁵ *See DQ Motion*, ¶ 1.

in the PSA.⁶ The record closed on the retention of Debtors' Counsel and Committee's Counsel more than a year ago when these parties were retained and the Ad Hoc Group did not lodge an objection.⁷ The Ad Hoc Group chose not to argue that the Intercompany Claims create a conflict of interest such that Debtors' Counsel, Committee's Counsel, and the Debtors' management, including Mr. Kruger, should be disqualified from participating in negotiations and litigation surrounding such claims until the eve of trial on the status of the Ad Hoc Group's claims. *See In re WorldCom, Inc.*, 311 B.R. 151, 168 (Bankr. S.D.N.Y. 2004) (denying a motion to disqualify based on facts known to the movant for more than ten months finding the delay in filing the motion was "potentially disruptive to the Debtors' reorganization [and] the interests of all creditors in these chapter 11 cases would have been hindered by the disqualification, as emergence could have been delayed without any foreseeable benefit to the Debtors' estates."); *In re O.P.M. Leasing Serv., Inc.*, 16 B.R. 932 (Bankr. S.D.N.Y. 1982) (rejecting a motion to disqualify trustee of consolidated bankruptcy cases despite existence of an interdebtor claim where motion to remove was a litigation tactic and disclosure of potential conflicts had been made at the time of appointment without objection). This timing is not coincidental—the DQ Motion was filed for impermissible tactical purposes more than a year after Debtors' Counsel and Committee's Counsel were retained by a final order of this Court.

II. No Conflict of Interest Exists.

4. The Ad Hoc Group has failed to demonstrate that a conflict of interest exists. The only indicia of a conflict the Ad Hoc Group can muster is the existence of Intercompany Claims

⁶ See *Plan Support Agreement* [ECF No. 6, Ex. 9]; *Order Appointing a Mediator* [ECF No. 2519].

⁷ See Transcript of Record at 13-16, 39-40, *In re Residential Capital LLC, et al.*, No. 12-12020 (July 13, 2012) attached hereto as Exhibit 1.

and the proposed treatment of such claims in the Plan.⁸ The Ad Hoc Group ignores that Debtors' Counsel, Committee's Counsel, and Mr. Kruger, on behalf of their respective clients, exercised their fiduciary duties and engaged in extensive arm's-length negotiations and mediation with other parties in interest, including Ally, under the guidance of a sitting United States Bankruptcy Judge that resulted in a global settlement with the Debtors' largest creditors that, among other things, resolves all Inter-Debtor Disputes, including the treatment of Intercompany Claims and provides for the payment in full of the Ad Hoc Group.⁹ Such actions are hardly indicative of a conflict, rather, they suggest that Debtors' Counsel, Committee's Counsel, and Mr. Kruger performed the very tasks their respective retentions anticipated by aligning the interests of all the Debtors pursuant to the PSA. Indeed, this Court found that the Debtors' entry into the PSA, which contractually binds each of the Debtors to support confirmation of the Plan, including the treatment of Intercompany Claims contained therein, was in the best interests of the Debtors' estates.¹⁰ The PSA exemplifies the good faith resolution of Intercompany Claims to maximize value for the estates in this Court's mediation process and the Debtors have a unity of purpose to

⁸ Ally's counsel, Kirkland & Ellis LLP ("**K&E**"), has been retained as debtor's counsel under section 327(a) of the Bankruptcy Code in numerous cases and has settled intercompany claims in such cases without disqualification. For example, in *Charter*, while certain noteholders threatened to file motions seeking disqualification of counsel as a result of intercompany claims, the issue of the treatment of such intercompany claims was ultimately litigated in connection with confirmation of a chapter 11 plan without the disqualification of counsel. See *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Op., LLC (In re Charter Commc'ns)*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009) (confirming a chapter 11 plan over arguments that the treatment of intercompany claims violated the debtors' fiduciary duties).

⁹ See *[Proposed] Disclosure Statement for the Joint Chapter 11 Plan of Residential Capital, LLC, et al. and the Official Committee of Unsecured Creditors* [ECF No. 4157], 34-36; see also Letter from Gary S. Lee, Partner, Morrison & Foerster LLP, to the Honorable Martin Glenn, United States Bankruptcy Judge (July 2, 2013) [ECF No. 4290, Ex. C] ("The decision to settle the intercompany claims in the context of a Plan resulted from a deep, considered analysis conducted by a variety of parties, including the Debtors' CRO, the Debtors' counsel, the Debtors' financial advisors, the Committee's counsel, the Committee's financial advisor, and a myriad of other business professionals and their respective advisors. The decision, moreover, was undertaken under the purview of a mediation conducted by a sitting United States Bankruptcy Court Judge.").

¹⁰ See *Order Granting the Debtors' Motion for an Order Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing the Debtors to Enter into a PSA with Ally Financial Inc., the Creditors' Committee, and Certain Consenting Claimants* [ECF No. 4098] ("The [PSA] . . . is in the best interest of the Debtors' estates").

prosecute the PSA to maximize the value of the estates. *See In re O.P.M. Leasing Servs., Inc.*, 16 B.R. at 941 (holding where a “unity of interest” exists between debtor estates that share a “common goal . . . there is no impropriety in the same attorney representing multiple related debtors.”). If the Ad Hoc Group has concerns regarding the process leading to the Plan, those issues, to the extent not precluded by this Court’s order approving the PSA, should be heard in the context of the confirmation hearing.

5. Moreover, Mr. Kruger was retained, in part, to address any concerns that the Debtors’ senior officers’ and management personnel’s historical experience with the Debtors’ business would be an impediment to tackling matters such as the treatment of Intercompany Claims.¹¹ The implication of the DQ Motion is that Mr. Kruger, as the CRO with acknowledged fiduciary obligations to all of the Debtors, while engaged in a court-supervised mediation with the Honorable James M. Peck, is not permitted to determine that the Plan, which embodies a settlement of, among other things, Intercompany Claims, is in the best interest of all of the Debtors and each Debtor’s separate estate and is the appropriate resolution of such Intercompany Claims—a result that contradicts a key purpose of Mr. Kruger’s retention.

III. Disqualification of Debtors’ Counsel, Committee’s Counsel, and the Debtors’ Management Is Unwarranted.

6. Even if this Court were to determine that a conflict of interest exists, the Ad Hoc Group has not met the “heavy burden” and “high standard of proof” required for a party seeking disqualification. *In re Caldor, Inc.-NY*, 193 B.R. 165, 178 (Bankr. S.D.N.Y. 1996); *see also In re Cleveland Trinidad Paving Co.*, 218 B.R. 385, 388 (Bankr. N.D. Ohio 1998) (“The burden of proof is on the movant . . . as the party in interest who seeks disqualification of a professional

¹¹ *See Debtors’ Motion Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code for an Order Authorizing the Debtors to Appoint Lewis Kruger as Chief Restructuring Officer* [ECF No. 2887], ¶ 23.

appointed under §327(a). That burden must be borne by a preponderance of the evidence to show that the standards of § 327(a) and [Bankruptcy] Rule 2014 have been compromised.”). Because motions to disqualify counsel are drastic measures that can result in denying a client representation of the attorney of their choice, motions to disqualify are generally disfavored and are subject to “fairly strict scrutiny.” *In re Wingspread Corp.*, 152 B.R. 861, 863 (Bankr. S.D.N.Y. 1993); *In re Allboro Waterproofing Corp. v. Allboro Bldg. Maint. (In re Allboro Waterproofing Corp.)*, 224 B.R. 286, 290 (Bankr. E.D.N.Y. 1998).

7. As evidence that a conflict of interest exists, the Ad Hoc Group merely points to the existence of Intercompany Claims and the proposed treatment of such claims in the Plan. However, the “presence of intercompany claims between debtors represented by the same counsel does not automatically warrant the disqualification of that counsel.” *In re Adelphia Commc’ns Corp.*, 342 B.R. 122, 128 (S.D.N.Y. 2006). Note, the Ad Hoc Group’s position is contrary to practice in most complex chapter 11 cases because in such cases a unity of interest exists between the debtors and the expense of retaining counsel for each debtor would bring the debtors’ estates to their knees. *See id.* (finding that requiring the appointment of independent professionals to represent each individual debtor in large bankruptcy cases would burden estates with “unjustified and insurmountable costs.”). The implication that the Debtors should be required to retain 51 law firms to serve as conflicts counsel is untenable. The Ad Hoc Group has submitted no evidence beyond the statements in the DQ Motion.

8. Further, the determination of whether an adverse interest exists is a fact-specific inquiry that is best determined on a case-by-case basis. *In re JMK Constr. Group, Ltd.*, 441 B.R. 222, 230 (Bankr. S.D.N.Y. 2010). Because of this, the cases cited by the Ad Hoc Group are easily distinguishable and are thus unpersuasive. For example, in *In re JMK Construction*

Group, Ltd., 441 B.R. 222 (Bankr. S.D.N.Y. 2010), this Court rejected a motion seeking joint retention at an early stage of the case because of potential issues posed by unresolved interdebtor claims. *JMK* dealt with conflicts raised at the time of retention—not conflicts fourteen months into a chapter 11 case—and highlights the Ad Hoc Group’s failure to timely raise these issues. Additionally, the decision in *In re Granite Partners, L.P.*, 219 B.R. 22 (Bankr. S.D.N.Y. 1998) is distinguishable because that case addressed improper concealment and failure to disclose conflicts.¹² Importantly, no case cited by the Ad Hoc Group addresses the fact that the Debtors have entered into a settlement with a their largest creditors, now embodied in the Plan, that sets forth a consensual resolution of the Intercompany Claims such that there is no current conflict among the Debtors on this issue.¹³ The Ad Hoc Group ignores that the Debtors’ largest creditors have effectively deemed that conflicts, if any, have been resolved by participating in mediation and subsequently entering into the PSA. In sum, particularly given that the Plan contemplates payment of the Ad Hoc Group in full, disqualification of Debtors’ Counsel, Committee’s Counsel, and Mr. Kruger is wholly unwarranted.

9. Finally, the practical result of the DQ Motion, if granted, is the effective derailing

¹² The other cases cited by the Ad Hoc Group are equally unpersuasive. See *In re Interwest Bus. Equip., Inc.*, 23 F.3d 311 (10th Cir. 1994) (affirming bankruptcy court’s rejection of multi-debtor representation in connection with a retention application where proposed counsel did not provide adequate information regarding the nature of intercompany claims); *In re Coal River Res., Inc.*, 321 B.R. 184 (W.D. Va. 2005) (affirming rejection of multi-debtor representation in connection with an application to represent four debtors where discrepancies existed with regard to scheduled amounts of intercompany debt); *In re Star Broad., Inc.*, 81 B.R. 835 (Bankr. D.N.J. 1988) (rejecting proposed representation of two debtors where substantial interdebtor claims were asserted and unexplained inconsistencies existed between the debtors’ schedules and financial statements); *In re Jennings*, 199 Fed. App’x 845 (11th Cir. 2006) (affirming disqualification of counsel for failure to fully disclose the connections between the firm and its eleven debtor clients); *In re Straughn*, 428 B.R. 618 (Bankr. W.D. Pa. 2010) (rejecting applications for dual representation of closely held corporate debtor and its principal who was liable for debt incurred by the corporate debtor); *In re Shore*, No. 03-43072, 2004 WL 2357992 (Bankr. D. Kan. May 14, 2004) (disqualifying law firm whose retention application failed to disclose relationships with parties economically adverse to the debtor).

¹³ See *In re Adelphia Commc’ns Corp.*, 336 B.R. 610 (Bankr. S.D.N.Y. 2006) (“[C]onsensual resolution [of interdebtor issues] is the normal (and preferred) practice.”).

or at least wounding of the Debtors' chapter 11 cases and prosecution of the Plan during the Debtors' exclusive periods. Pursuant to this Court's instruction, the proper time to hear issues related to the 9019 settlements in the Plan, including the valuation of Intercompany Claims, is in connection with confirmation of the Plan.¹⁴ Should the Ad Hoc Group or any creditor of the Debtors have concerns about the treatment of Intercompany Claims, they will have an opportunity to raise objections and receive an impartial ruling on the treatment of Intercompany Claims in connection with Plan confirmation.

[Remainder of page intentionally left blank.]

¹⁴ See Transcript of Record at 17, *In re Residential Capital LLC, et al.*, No. 12-12020 (July 3, 2013) (“[I]f [the Ad Hoc Group] oppose[s] plan confirmation, and if they oppose the global settlement with respect to intercompany claims, I’m going to have to hear the evidence and decide it as part of plan confirmation . . .”) attached hereto as Exhibit 2.

For the foregoing reasons, Ally respectfully requests that this Court deny the DQ Motion.

New York, New York

Dated: July 26, 2013

/s/ Ray C. Schrock

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EXHIBIT 1

**Transcript of Record at 13-16, 39-40, *In re Residential Capital LLC, et al.*, No. 12-12020
(July 13, 2012)**

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, ET AL.,

Debtors.

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United States Bankruptcy Court

One Bowling Green

New York, New York

July 13, 2012

10:05 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

(Doc# 90, 47) Status Conference RE: Motion Authorizing The Debtors To Continue To Perform Under The Ally Bank Servicing Agreements In The Ordinary Course Of Business.

(CC: Doc no. 509) Debtors' Application Under Section 327(e) of the Bankruptcy Code, Bankruptcy Rule 2014(a) and Local Rule 2014-1 for Authorization to Employ and Retain Dorsey & Whitney LLP as Special Securitization and Investigatory Counsel to the Debtors, Nunc Pro Tunc to May 14, 2012 filed by Darren M. Nashelsky on behalf of Residential Capital, LLC..

(CC: Doc no. 512) Debtors' Application for Order Authorizing the Employment and Retention of Rubenstein Associates, Inc. as Corporate Communications Consultant to the Debtors Nunc Pro Tunc to the Petition Date.

(CC: Doc no. 511) Debtors' Application for an Order Authorizing Employment and Retention of Mercer (US) Inc. as Compensation Consultant to the Debtors Nunc Pro Tunc to the Petition Date filed by Darren M. Nashelsky on behalf of Residential Capital, LLC.

(CC: Doc no. 508) Debtors' Application Under Section 327(e) of the Bankruptcy Code, Bankruptcy Rule 2014(a) and Local Rule 2014-1 for Authorization to Employ and Retain Carpenter Lipps & Leland LLP as Special Litigation Counsel to the Debtors, Nunc Pro Tunc to May 14, 2012 filed by Darren M. Nashelsky on behalf of Residential Capital, LLC.

(CC: Doc no. 510) Debtors' Application Under Section 327(e) of the Bankruptcy Code, Bankruptcy Rule 2014(a) and Local Rule 2014-1 for Authorization to Employ and Retain Orrick, Herrington & Sutcliffe LLP as Special Securitization Transactional and Litigation Counsel to the Debtors, Nunc Pro Tunc to May 14, 2012 filed by Darren M. Nashelsky on behalf of Residential Capital, LLC.

(CC: Doc no. 506) Debtors' Application Pursuant to Section 327(a) of the Bankruptcy Code, Bankruptcy Rules 2014 and 2016 and Local Rules 2014-1 and 2016-1, for Entry of an Order Authorizing the Retention and Employment of Morrison & Foerster LLP as Bankruptcy Counsel to the Debtors Nunc Pro Tunc to the Petition Date filed by Darren M. Nashelsky on behalf of Residential Capital, LLC.

(CC: Doc no. 528) Application Pursuant to Sections 328 and 1103 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2014 for an Order to Retain and Employ Kramer Levin Naftalis & Frankel LLP as Counsel to the Official Committee of Unsecured Creditors of the Debtors, Nunc Pro Tunc, to May 16, 2012 filed by Kenneth H. Eckstein on behalf of Official Committee Of Unsecured Creditors.

(Doc no. 527) Debtors' Application for Order Under Bankruptcy Code Sections 327(a) and 328(a), Bankruptcy Rule 2014(a) and Local Rule 2014-1 Authorizing the Employment and Retention of Curtis, Mallet-Prevost, Colt & Mosle LLP as Conflicts Counsel Nunc Pro Tunc to the Petition Date filed by Larren M. Nashelsky on behalf of Residential Capital, LLC.

(CC: Doc# 513) Debtors Motion for Order Pursuant to Bankruptcy Code Sections 105(a) and 331 Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals.

(CC: Doc# 514) Debtors Motion for Order Under Bankruptcy Code Sections 105(a), 327 and 330 and Bankruptcy Rule 2014 Authorizing Employment and Payment of Professionals Utilized in the Ordinary Course of Business Nunc Pro Tunc to the Petition Date.

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2 Doc# 531 Debtors' Application Pursuant to 11 U.S.C. Section
3 327(a) and Fed. R. Bankr. P. 2014 for Authorization to Employ
4 and Retain Kurtzman Carson Consultants LLC as Administrative
5 Agent Nunc Pro Tunc to the Petition Date filed by Larren M.
6 Nashelsky on behalf of Residential Capital, LLC.

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17 BY: THOMAS O. KELLY, III, ESQ.

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19
20 ALSO PRESENT:

21 CORLA JACKSON, Pro Se

22 JOHN DEMPSEY, Mercer (TELEPHONICALLY)

23 ALAN TESSLER, Rubenstein & Associates (TELEPHONICALLY)

RESIDENTIAL CAPITAL, LLC, ET AL.
P R O C E E D I N G S

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THE COURT: Please be seated. We're here in
Residential Capital, LLC, number 12-12020. Mr. Marinuzzi?

MR. MARINUZZI: Good morning, Your Honor. For the
record, Lorenzo Marinuzzi, Morrison & Foerster, proposed
bankruptcy counsel for the debtors.

Your Honor, first of all, thank you for making
yourself and your staff available this morning for a hearing.
And I promise to do my best to move as quickly as possible.

Your Honor, we're here on a number of mostly
uncontested retention applications filed by the debtors and one
filed by the committee, as well as a status conference on the
subservicing matter. And if I proceed in the order in which
matters are listed in the agenda, Your Honor, you'll note that
the retention applications filed by the committee and the
debtors for the financial advisors FTI and Centerview, Moelis
and AlixPartners, have been adjourned to the hearing on the
24th. And Your Honor, if it's okay, we'll skip the status
conference and deal with the retentions, so the professionals
that are here can leave.

Your Honor under uncontested matters is the motion to
approve interim compensation and reimbursement of expenses.
There were changes requested by the committee, which we've
incorporated into the order. I believe chambers has seen a
copy of the marked order, but I'm happy to walk through the

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1 changes if Your Honor would like.

2 THE COURT: No, that is okay. Let me ask, does
3 anybody else wish to be heard with respect to the interim
4 compensation order.

5 All right. It's approved.

6 MR. MARINUZZI: Thank you, Your Honor. The next item
7 on the agenda is the debtors' application to retain under
8 327(a) Kurtzman Carson Consultants, as administrative agents,
9 nunc pro tunc. Your Honor, there was one change requested by
10 the committee to the order. KCC's been retained as the
11 noticing agent, and they have a retainer for expenses, as is
12 provided in the general order. We picked up that retainer
13 concept unintentionally in the order for 327(a), so we just
14 deleted it.

15 THE COURT: Okay.

16 MR. MARINUZZI: There were no objections.

17 THE COURT: Does anybody wish to be heard with respect
18 to the Kurtzman Carson retention?

19 It's approved.

20 MR. MARINUZZI: Thank you, Your Honor. The next item
21 is the motion requesting the -- authorizing the preliminary
22 payment of ordinary-course professionals. Your Honor, there
23 was an objection to the motion filed by the United States
24 Trustee, in particular with respect to the amounts, because we
25 had proposed 75,000 and 750. And in revisiting and scrubbing

RESIDENTIAL CAPITAL, LLC, ET AL.

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1 the numbers with the company again, we decided that we can work
2 within the request of the U.S. Trustee for 50,000 per month and
3 500,000 dollars over the course of the case. So we've made
4 those changes to the order.

5 There's one other concept that was not in the motion
6 as filed, but it was raised in discussions regarding
7 retentions. And as I'll get to, the professionals on the
8 debtors' side have agreed, whatever retainers they have,
9 they're going to apply to the first fees paid out. And we want
10 to incorporate that concept with respect to ordinary-course
11 professionals, to the extent that they're holding retainers.
12 We'd like them to apply the retainers against the first fees
13 paid; and we've built that into the order.

14 THE COURT: Anybody wish to be heard with respect to
15 the retention of ordinary course professionals?

16 All right, that's granted.

17 MR. MARINUZZI: Your Honor, the next item on the
18 agenda is the debtors' application to retain Curtis Mallet as
19 conflicts counsel.

20 THE COURT: Yes.

21 MR. MARINUZZI: No objections to that motion, Your
22 Honor. Unless Your Honor has any questions, we'd ask that that
23 application be granted.

24 THE COURT: Anybody wish to be heard with respect to
25 the Curtis Mallet retention application?

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1 All right, it's granted.

2 MR. MARINUZZI: Thank you, Your Honor. Under
3 contested matters is the application to retain Morrison &
4 Foerster. The U.S. Trustee filed an objection raising
5 duplication issues that we'll talk about, as it pertains to the
6 327(e) professionals as well, and asked for additional
7 disclosures, which we've made, as did the other professionals.

8 We believe, subject to negotiating a form of order for
9 the United States Trustee that satisfies them on the
10 duplication issue, and we think that a template for that is
11 really set forth in the supplemental declarations provided by
12 the 327(e) professionals, that provides a finer point on the
13 services they're going to be provided, we think we've resolved
14 the U.S. Trustee's objection.

15 THE COURT: Mr. Masumoto?

16 MR. MASUMOTO: Good morning, Your Honor. Brian
17 Masumoto for the Office of the United States Trustee. Counsel
18 is correct. But if I may state for the record, some of the
19 concepts that we had wanted to incorporate. One is with
20 respect to the catchall provision that exists. We're hoping to
21 narrow it down to indicate that any of the, at the moment,
22 undefined services that may be provided for by the
23 professionals would be within the scope of the services that
24 they're hired at this point. Anything beyond that scope,
25 they'd have to get a separate order of the Court.

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1 In addition, we're asking that as they expand their
2 services within the scope of the area for which they're
3 retained, they would file supplemental declarations to indicate
4 that they're doing these additional services.

5 What we're also hoping to work out and include in the
6 order is the concept that with respect -- between and among
7 debtors' counsel and the special counsel, that project
8 categories be as uniform as possible, to allow for a -- to
9 facilitate the review of any potential duplication.

10 THE COURT: I think that's the key. Because at least
11 one -- certainly one of the keys from our standpoint -- "our
12 standpoint" meaning my chambers' -- we do review fee
13 applications quite carefully. When it becomes most difficult
14 is when there's no uniform set of project categories among
15 professionals. So to the extent possible, that should be done.
16 Because it does really help facilitate our review.

17 MR. MASUMOTO: Yes, Your Honor. And we're hoping to
18 incorporate that within the context of the order.

19 THE COURT: All right. Mr. Marinuzzi, where do things
20 stand in terms of trying to negotiate language for the order?

21 MR. MARINUZZI: We just had a conversation this
22 morning, Your Honor.

23 THE COURT: Okay.

24 MR. MARINUZZI: We knew conceptually that we were
25 going to get to the point of just finding the right language.

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1 But I think we've resolved it, subject to the language that
2 we're going to negotiate after the hearing.

3 THE COURT: All right. Anybody else wish to be heard
4 with respect to the Morrison & Foerster retention application?

5 Mr. Eckstein?

6 MR. ECKSTEIN: Your Honor, good morning. Kenneth
7 Eckstein, proposed counsel for the creditors' committee.
8 Judge, generally, we had filed a reservation of rights on a
9 similar point with respect to avoiding duplication. It's a
10 complicated case. There are the need for a lot of different
11 professionals and expertise. And we thought it was just worth
12 noting that I think all parties are going to have to work both
13 on the legal and the financial side to really ensure that there
14 is no duplication and that there's efficiency. I think that's
15 something we have to focus on prospectively.

16 THE COURT: Okay. I mean, one of the things that's a
17 little unusual or a little different in this case is that the
18 debtors expressed from the start, I think with the support of
19 the committee, that ResCap be able to conduct business as
20 usual. Part of their business as usual involves a lot of
21 litigation around the country. The Court's already entered an
22 order lifting the stay as to various types of claims and
23 things. And there are lawyers representing ResCap in those
24 cases. And when I reviewed the retention applications, a
25 number of them are involved in the representation of the

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1 debtors in ongoing litigation.

2 So I certainly -- while the Court is always concerned
3 about proliferation of professionals in a case, I certainly
4 fully understand that the nature of this case requires it, but
5 it also requires the effort to monitor that there isn't
6 unnecessary -- there isn't duplication of effort and that Mr.
7 Marinuzzi, you know, at the end of the day, from the debtors'
8 side, the buck stops with your firm. And if the U.S. Trustee
9 or the Court begins to raise questions about duplication, you
10 and your colleagues are the ones who are going to have to make
11 sure that that doesn't happen. Okay?

12 MR. ECKSTEIN: We're all counting on Morrison &
13 Foerster.

14 THE COURT: Yes, I know.

15 MR. MARINUZZI: Thank you, Your Honor.

16 THE COURT: All right. Anybody else wish to be heard?

17 All right, the Morrison & Foerster retention is
18 approved subject to the Court's review of a proposed order when
19 that's submitted.

20 MR. MARINUZZI: Thank you, Your Honor.

21 THE COURT: Okay.

22 MR. MARINUZZI: The next application is the debtors'
23 application to retain Carpenter Lipps & Leland as special
24 counsel under 327 --

25 THE COURT: That's one of the firms I had specifically

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1 in mind, because they're representing the debtors in
2 litigation.

3 MR. MARINUZZI: Yes. On litigation that's been
4 ongoing for years.

5 THE COURT: Right.

6 MR. MARINUZZI: There was one objection. And we'll
7 deal the same way we'll deal with Morrison & Foerster and the
8 other 327(e), with crafting language with the U.S. Trustee.
9 The same resolution will apply to Carpenter --

10 THE COURT: There's also the Lewis application --

11 MR. MARINUZZI: Exactly.

12 THE COURT: -- Lewis objection. It's overruled.

13 MR. MARINUZZI: Thank you, Your Honor.

14 THE COURT: Does anybody else wish to be heard with
15 respect to the Carpenter Lipps & Leland retention application?

16 All right, it's approved, subject again, to reviewing
17 the order.

18 MR. MARINUZZI: Thank you, Your Honor. And that
19 brings us to the debtors' application to retain Dorsey &
20 Whitney as special securitization and investigatory counsel
21 under Section 327(e). Same resolution with the U.S. Trustee,
22 Your Honor.

23 THE COURT: Explain to me a little bit more about what
24 is -- in terms of investigations, what's -- who's doing what
25 among the professionals for the debtor?

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1 MR. MARINUZZI: Your Honor, there were investigations
2 and actions that commenced before the petition date where the
3 company retained, in this case, Dorsey & Whitney. And
4 depending upon how long ago these proceedings began, there was
5 either a great deal of work done or not so much work done. And
6 whatever work had been done, is work that, to the extent
7 Morrison & Foerster is going to take over the work -- now many
8 of these are stayed, but who knows what might happen in the
9 future and how we have to resolve these claims as part of a
10 plan process -- as we progress in the case, I anticipate with
11 respect to the activities and Dorsey & Whitney, that they'll
12 become Morrison & Foerster activities.

13 But we're going to need their cooperation. We're
14 going to need the information they've already obtained,
15 whatever progress has happened in the case to date, for us to
16 actually have a smooth transition from Dorsey & Whitney to
17 Morrison & Foerster.

18 In court today is Tom Kelly, to the extent that Your
19 Honor has any specific questions that I can't answer.

20 THE COURT: Well, one --

21 MR. MARINUZZI: I'm sure he'd be happy to answer them.

22 THE COURT: -- question I have, and this may apply to
23 others. Dorsey & Whitney had a pre-petition retainer at
24 250,000 dollars. What's not clear to the Court is how much of
25 that remains.

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1 MR. MARINUZZI: Your Honor, I don't know. I'll defer
2 to Dorsey & Whitney. I thought it might have been addressed in
3 the supplemental declaration. But if it's not --

4 THE COURT: Maybe it was and I missed it.

5 I guess it is, because I see Mr. Masumoto pointing to
6 it.

7 MR. KELLY: It was addressed, Your Honor --

8 THE COURT: Okay.

9 MR. KELLY: -- in the supplemental declaration. We
10 have not applied any of it, because the case was filed and we
11 hadn't --

12 THE COURT: Right.

13 MR. KELLY: -- done so. We have 227,000 dollars'
14 worth of pre-petition fees and disbursements that we want to
15 apply.

16 THE COURT: Against the 250,000 dollar retainer?

17 MR. KELLY: Right. So we'll have 22,000 left
18 afterwards.

19 THE COURT: Okay. All right, thank you very much.

20 Does anybody else wish to be heard with respect to the
21 Dorsey & Whitney retention application?

22 All right, it's granted.

23 MR. MARINUZZI: Thank you, Your Honor. That brings us
24 to the debtors' application to retain Orrick, Herrington &
25 Sutcliffe under 327(e). Your Honor, the simplest way I could

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1 describe Orrick is that they wrote many of the securitization
2 documents that we're going to need some help analyzing during
3 the case.

4 THE COURT: Okay. Anybody wish to be heard with
5 respect to the Orrick, Herrington & Sutcliffe retention
6 application?

7 All right, it's granted.

8 MR. MARINUZZI: Thank you very much, Your Honor. Your
9 Honor, that brings us to the debtors' application to retain
10 Mercer as compensation consultant. Your Honor, the objection
11 was filed by the U.S. Trustee regarding the payment of
12 attorneys' fees, which was the subject of Your Honor's decision
13 in Borders. I'll turn over the podium to Mr. Masumoto to
14 prosecute his objection.

15 THE COURT: Okay.

16 MR. MASUMOTO: Good morning, Your Honor. Brian
17 Masumoto for the Office of the United States Trustee. Your
18 Honor, with respect to the Mercer application, we had several
19 objections, all of which have been resolved. I just wanted to
20 mention the two, sort of, that remained at the end, were the
21 concept that they're hourly compensa -- their quarter-hour
22 increment in terms of their records. The supplement addresses
23 it in somewhat of a convoluted fashion, but it seems --

24 THE COURT: They ought to change their system to
25 tenths of an hour, but --

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1 MR. MASUMOTO: I understand, Your Honor. But it
2 appears that over fifteen minutes, they'll be rounding down for
3 the first ten, and for the last five, they would round up,
4 which seems to be consistent with the tenths of an hour
5 increment, and avoiding the concern of overbilling to the
6 estate. So that appears to have been resolved.

7 The remaining issue is the one that Mr. Marinuzzi
8 alluded to. And as we have indicated in our papers, as we
9 understand the Court's decision in Borders --

10 THE COURT: Well, I think -- you know, I read your
11 objection. You obviously continued the objection. But I
12 thought you actually went a little too light on it, in the
13 sense that the Borders decision first -- I mean, it was
14 distinguishable from this case, because Borders makes clear
15 that the objection to the Mercer application did not arise
16 until the first fee application. That at the time of the
17 retention the Office of the U.S. Trustee had asserted a general
18 reservation of rights but had not specifically objected to the
19 expense reimbursement provision as being the source of
20 authority for counsel retention.

21 So I think there's more to your objection here than
22 there was in Borders. Now, that, of course, isn't the end of
23 the story. The supplemental declaration submitted answers
24 maybe part of the question. But in the Borders opinion, which
25 I reread again this morning, I focused on let's deal solely

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1 with the reimbursement of outside counsel in connection with
2 retention. I asked, in that opinion, a series of questions
3 about whether the professional in that case and in this case,
4 Mercer, charges its clients both for bankruptcy matters and
5 nonbankruptcy matters for counsel fees in connection with
6 retention. I specifically raised the question in the Borders
7 decision whether it is or should be considered part of
8 overhead. There were a whole -- there were a series of
9 questions that I raised.

10 Certainly, here you've raised the objection, and it is
11 at the retention stage, not at the fee application stage. I
12 guess the one thing that I said and would still adhere to here
13 is that 327 is not the issue. And I guess the supplemental
14 declaration says that -- the supplemental declaration of John
15 Dempsey, paragraph 8: "Mercer customarily requests and
16 receives similar reimbursement rights from its clients."

17 That same paragraph 8 says that, "To date, Mercer's
18 outside legal fees are estimated at less than \$6,000. Mercer
19 will only seek reimbursement from the debtors of those legal
20 fees that were performed solely on behalf of Mercer."

21 I guess -- I'll let you -- you can say more if you
22 want. I don't know how far you explored this. I mean, I don't
23 think -- the Borders -- I adhere to what I said in Borders.
24 But what I said in Borders is more complicated in a situation
25 such as the one where you've raised your objection now.

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1 MR. MASUMOTO: Well, Your Honor, as to -- it seems
2 that the issue of inquiry as to whether it would be part of
3 overhead is actually part of the objection that the U.S.
4 Trustee has raised --

5 THE COURT: I know.

6 MR. MASUMOTO: -- in the past. And I don't know
7 whether or not, again, within the parameters of the judge's
8 decision in Borders, indicating that if they customarily bill
9 it outside, whether that disposes of the inquiry as to whether
10 or not it's treated as part of their overhead.

11 In addition, we assume that even in accordance with
12 the Borders decision, going forward, to the extent that they
13 have -- if they use outside counsel to review their time
14 records and so forth, within the prohibited categories, that
15 that would still be subject to an objection and disallowance at
16 the fee application stage.

17 THE COURT: All right.

18 MR. MASUMOTO: As to whether or not fee app
19 preparation, on the other hand, I think that may be probably
20 the most outstanding issue related to going forward, the issue
21 of whether or not outside counsel could prepare their fee
22 application and include that as reimbursement, is a frequent
23 concern that arises.

24 At this stage, the services for being retained are
25 identified at 6,000. But going forward, the ones that we've

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1 seen to be included among the permissible services argued by
2 the financial advisors is that fee application preparation
3 should also be included and permitted by outside counsel. If
4 the Court's inclined to clarify that point at the outset, I
5 think it might help the parties. I think they're on notice
6 with respect to the impermissible types of services.

7 THE COURT: Well, let me say, if I approve the
8 retention as presented, I believe, and I'm making it clear now,
9 that because it's -- it then becomes part of actual necessary
10 expenses, and the issue under actual and necessary expenses
11 leaves it to the Court to review the detailed application. As
12 occurred in Borders, I think initially it was just listed as an
13 expense item and the Court requested and received detailed fee
14 statement from Freeborn & Peters, which I guess is also the
15 same counsel here.

16 MR. MASUMOTO: Same firm.

17 THE COURT: And we reviewed that in detail for
18 reasonableness; also looked at it and disallowed a very small
19 portion of the fees because it appeared to the Court to be work
20 for the estate as opposed solely for Mercer. And the
21 engagement letter here, I think make clear. It says on page 3,
22 "In addition to such compensation, we also bill for necessary
23 travel and other expenses related to the services requested,
24 including legal fees associated with our retention, subsequent
25 fee application with the U.S. Bankruptcy Court, if required,

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1 and any request of participation in contested matters of
2 litigation, such as depositions, responding to subpoenas or
3 discovery requests and court testimony."

4 So I mean, in Borders I decided, and would adhere to,
5 that because lawyers can charge for preparation of their fee
6 applications that other professionals can. And it would
7 frequently be the case that lawyers would be used in connection
8 with retaining it. When I review the fees to conclude whether
9 they're reasonable, and I'm definitely going to -- assuming I
10 approve the application -- everybody ought to understand,
11 Mercer needs to understand, I would do it expressly with the
12 understanding, the Court reserve the right to review the
13 specific amount of fees sought in connection with preparation
14 of fee applications.

15 In Borders I think I cited some cases that
16 distinguished between preparation of fee applications and the
17 cost of "defending" a fee application if it's challenged. That
18 may or may not -- Judge Bernstein -- I cited to one of Judge
19 Bernstein's decisions on that. And I do see that distinction
20 and would adhere to that distinction.

21 And Mr. Masumoto, are you objecting to the indemnity
22 concept?

23 MR. MASUMOTO: No. With respect to indemnity,
24 usually, in fact, explicitly the provisions under the indemnity
25 provisions allow attorneys representing the professional with

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1 respect to indemnification issues. That is one attorneys' fees
2 that we explicitly allow, subject to, again, all of the normal
3 guideline restrictions that apply.

4 THE COURT: You know, I said in Borders at 456 B.R.
5 208, "Professionals may only be compensated in bankruptcy cases
6 for reasonable fees and expenses, taking into consideration
7 customary fees in bankruptcy and nonbankruptcy matters,"
8 referring to General Order M-389. "If a professional does not
9 charge for counsel fees for negotiating retention in
10 nonbankruptcy matters, then such charges are inappropriate in
11 bankruptcy cases. Expense reimbursement should also bear a
12 reasonable relationship to the likely amount of the
13 professional's compensation. Caps on the amount of
14 reimbursable expenses can also be negotiated. But where the
15 fees are incurred in representing the professionals and not in
16 performing work for the debtor, Section 327 does not apply."

17 Mr. Marinuzzi, is there an estimate of what the total
18 fees for Mercer are likely to be in the case? I mean, nobody
19 took me up on my invitation to negotiate a cap for what -- I
20 mean, I don't know. Has the clock stopped running on the fees
21 on retention?

22 MR. MARINUZZI: Well, Your Honor, I think in theory --
23 well, actually no, insofar as counsel is on the phone right
24 now. I --

25 THE COURT: Well, I hope they like listening. But I'm

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1 not sure I would reimburse them for the expenses of listening
2 in today. Okay?

3 MR. MARINUZZI: Okay. I guess --

4 THE COURT: They might take that into account when
5 then put in a fee application.

6 MR. MARINUZZI: -- I guess, Your Honor, my response
7 is, it will depend in large measure on how much work is done in
8 connection with the KEIP KERP and frankly how much opposition
9 there is to the KEIP KERP.

10 THE COURT: Well, the U.S. Trustee always objects to a
11 KEIP KERP.

12 MR. MARINUZZI: And we hope to work through those
13 issues before we actually file the motion. We intend to
14 provide them with a draft. We hope to work through the issues
15 with the committee. We really want to try to minimize the time
16 in front of the Court as well as deposition time.

17 In the context of this case, Your Honor, obviously,
18 this is not going to be a large expense. Having said that, I
19 don't know that I can suggest a cap. I just don't know.
20 They've incurred 6,000 to date. If they have to attend and
21 prepare for depositions --

22 THE COURT: I'm just talking about retention right
23 now.

24 MR. MARINUZZI: Retention? I --

25 THE COURT: The indemnification issue, I think Mr.

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1 Masumoto has already indicated -- if Mercer's going to be
2 deposed in connection with a KEIP and KERP, for example, Mr.
3 Masumoto, I guess you wouldn't disagree they're entitled to
4 have counsel represent their people at a deposition?

5 MR. MASUMOTO: That's correct, Your Honor.

6 THE COURT: Okay.

7 MR. MASUMOTO: To the extent that they need to
8 represent --

9 THE COURT: So that's not the issue, Mr. Marinuzzi.

10 MR. MARINUZZI: Okay. All right. Your Honor, if
11 we're talking specifically about retention issues, I would just
12 defer to counsel for Mercer, who is on the phone now.

13 THE COURT: Okay.

14 MR. EGGERT: Yes, Your Honor. This is Devon Eggert of
15 Freeborn & Peters on behalf of Mercer. In the supplemental
16 declaration, we indicated that to date for retention the amount
17 was less than 6,000. And assuming the retention application
18 would be granted today, there would be no more time for
19 retention. And we're mindful of the Court's request to not
20 seek reimbursement for the time spent for this hearing.

21 THE COURT: Thank you. You could seek it, but --

22 MR. MARINUZZI: Your Honor, we agreed that they
23 wouldn't fly out here for this hearing to save expense.

24 THE COURT: Is someone here from Mercer?

25 MR. MARINUZZI: Your Honor, the declarant, John

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1 Dempsey is on the phone.

2 THE COURT: All right. Mr. Dempsey, what I would like
3 to know is, you say in your supplemental declaration that
4 Mercer customarily requests and receives similar reimbursement
5 rights from its clients. What I'd like to know is, outside of
6 bankruptcy matters, do you regularly receive -- not request,
7 but receive reimbursement for counsel fees in connection with
8 your engagement?

9 MR. DEMPSEY: We receive reimbursement for our -- for
10 when we engage outside counsel in connection with litigation.

11 THE COURT: That wasn't my question. That wasn't my
12 question. My question -- I'm focusing -- the issue in my mind,
13 Mr. Dempsey, is whether retention is really built into
14 overhead. And so my question specifically is with respect to
15 your retention, whether you regularly charge for and receive
16 reimburse -- do you use outside counsel for retention in
17 nonbankruptcy matters?

18 MR. DEMPSEY: No we do not. But --

19 THE COURT: Do you --

20 MR. EGGERT: Your Honor, this is --

21 THE COURT: Just a second.

22 MR. EGGERT: -- Devon Eggert of --

23 THE COURT: No. Let's -- answer my questions. Then
24 I'll let you say what you want.

25 Do you have inside counsel?

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1 MR. DEMPSEY: We do. Which is corporate counsel.
2 They're not specialists in bankruptcy.

3 THE COURT: Well, but do they review -- your
4 engagement letter is boilerplate. Does your inside counsel
5 review retention applications before they're signed in
6 nonbankruptcy matters?

7 MR. DEMPSEY: Only -- well, there are not retention
8 applications --

9 THE COURT: Well, not applications. Engagement
10 letters. I mean, look, Mr. Marinuzzi, here's the thing that's
11 bothering me, and I said this in the Borders opinion. I wanted
12 to know -- in order to get reimbursed for counsel expenses in
13 connection with retention, you have to look to both bankruptcy
14 and nonbankruptcy matters. And I mean their engagement letter
15 is pure boilerplate, okay. And I don't -- yes, engagement in a
16 bankruptcy matter, retention in a bankruptcy matter, requires
17 more work than in a nonbankruptcy matter. But it seems -- do
18 you know whether they have been reimbursed for their outside
19 counsel fee -- do they use outside counsel, Mr. Marinuzzi, in
20 their retention in all bankruptcy matters?

21 MR. MARINUZZI: Your Honor, I don't know the answer to
22 that.

23 THE COURT: So I want to see another supplemental
24 declaration. I want to know whether they use outside counsel
25 in retentions in all bankruptcy matters; whether they have

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1 received reimbursement for outside counsel fees in all
2 bankruptcy matters. I don't want it to become automatic that
3 if they apply for retention in the Southern District of New
4 York, they simply get it. That was -- I mean, in Borders I
5 made clear, it would be a different -- it was a different issue
6 if the objection was raised at the time of retention. That's
7 what's happened here.

8 And so I'm not satisfied -- I mean, the 6,000 dollars
9 standing alone is not an inordinately high figure. That's not
10 my problem with it. But I don't understand why it's not built
11 into their overhead. Are they using the same rates -- do they
12 use the same rates in bankruptcy and nonbankruptcy matters? I
13 want to know more.

14 MR. MARINUZZI: That's fine, Your Honor.

15 THE COURT: Okay.

16 MR. MARINUZZI: We'll work with Mercer to provide --

17 MR. EGGERT: Your Honor, this is Devon Eggert. May I
18 just add just a small point of clarification?

19 THE COURT: Go ahead.

20 MR. EGGERT: If I may? The question about if Mercer
21 uses outside counsel outside of bankruptcy. The amounts
22 incurred to date relating to retention, that does not have any
23 time with respect to negotiating the engagement letter. That
24 deals only with the retention application. So if Mr. Dempsey
25 is negotiating with a potential client on an engagement letter

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1 for compensation services, we are typically not involved at
2 that point.

3 THE COURT: Does Mercer have a different fee structure
4 for matters involving companies that are in a Chapter 11
5 proceeding versus nonbankruptcy matters?

6 MR. EGGERT: I think I would have to defer to John
7 Dempsey on that question.

8 THE COURT: Mr. Dempsey?

9 MR. DEMPSEY: Yes, this is John Dempsey. No, we
10 charge the same hourly rates inside and outside of bankruptcy.
11 And we charge -- we are reimbursed for legal expenses
12 associated with work on behalf of the client. And the contract
13 negotiation of engagement letters, as Devon has noted, is a
14 separate process from this process of getting retained in
15 Court, which is unique to bankruptcy. And we have -- we always
16 have this provision for seeking reimbursement, because it's a
17 special thing we do on behalf of our clients because we are
18 asked by the debtor's counsel to go down this process of
19 getting retained.

20 THE COURT: So --

21 MR. DEMPSEY: This is something the client is
22 triggering that we have to do.

23 THE COURT: Mr. Marinuzzi, I specifically said in the
24 Borders decision at 456 B.R. 208, "If a professional does not
25 charge for counsel fees for negotiating retention in

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1 nonbankruptcy matters, then such charges are inappropriate in
2 bankruptcy cases."

3 MR. MARINUZZI: What I think I heard is they're not
4 charging for negotiation of the engagement letter; it's the
5 retention application that they're charging for.

6 THE COURT: And this said retention, it didn't say
7 engagement letters. So --

8 MR. EGGERT: Well, Your Honor, Devon Eggert for
9 Mercer. Just one last point. I mean, there really aren't any
10 charges for retention outside of bankruptcy. And I think that
11 was what Mr. Dempsey was getting at, is that the unique nature
12 of a bankruptcy case and needing to be retained is why there's
13 a charge for retention in a bankruptcy case, but there's no
14 charge for retention outside of bankruptcy.

15 And when he enters into these engagements before a
16 company files for bankruptcy, this provision is in here in the
17 event the bankruptcy actually occurs. There are engagements
18 where he has this provision but the company does not file for
19 bankruptcy. But that provision is still in those engagement
20 letters.

21 MR. MASUMOTO: Excuse me, Your Honor. If I may? I
22 believe you quoted to the supplement previously in paragraph 8
23 where it says, "Mercer customarily requests and receives
24 similar reimbursement rights from its clients," which seems to
25 suggest that they are asking for reimbursement for attorneys'

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1 fees outside of bankruptcy, contrary to, I guess, what was just
2 stated. So maybe just a --

3 THE COURT: Well, I think what they're saying is they
4 don't -- the language may be there, but outside of bankruptcy
5 they don't need -- they have the right, but outside of
6 bankruptcy they don't use outside counsel, because they don't
7 have to do a retention application. So --

8 MR. EGGERT: That's correct, Your Honor. It's never
9 triggered.

10 THE COURT: -- right, it's not triggered. The
11 language is there, it's just not triggered. And look, I'm
12 mindful of that. I guess -- is there somewhere in the
13 declarations that it indicates that Mercer charges the same
14 hourly rates for matters that are in bankruptcy and outside of
15 bankruptcy?

16 MR. EGGERT: Your Honor, in paragraph 15 of the
17 original declaration, it says, "The fee structure and other
18 provisions of the engagement letter are consistent with the
19 terms of other Mercer engagements, both in and out of
20 bankruptcy court proceedings."

21 THE COURT: Okay, thank you. Mr. Masumoto?

22 MR. MASUMOTO: Your Honor, if Your Honor is satisfied
23 that the overhead issue has been resolved, we'll defer to the
24 Court's order. But if they're only charging for the retention
25 application, which does not exist outside of bankruptcy, the

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1 issue of overhead is not fully addressed.

2 From our standpoint, we believe that it should be,
3 even in the bankruptcy context, part of the cost of doing
4 business. I mean, many people interview before committees and
5 they incur the cost of what we refer to as a "beauty contest".
6 And if they're not, obviously, selected, they can't apply to
7 the estate for the cost of seeking to be retained. Similarly,
8 the cost of being retained in the bankruptcy context, we
9 believe, should be absorbed by the professional.

10 And particularly so in cases, as with Mercer, where
11 you have a sometimes not strictly an hourly rate. Particularly
12 with financial advisors, there's always the concern that in
13 essence, they're sort of farming off the cost of the expense.

14 THE COURT: I think the financial advisor, because the
15 fee structure is different, it's not an hourly basis, raises a
16 bigger issue about whether it's part of overhead or not, than a
17 professional that's billing strictly on an hourly basis.

18 MR. MASUMOTO: Understood, Your Honor. It's just
19 that, from our standpoint, we believe that even with hourly
20 professionals -- as Your Honor indicated, we're particularly
21 concerned with the financial advisors and fixed monthly
22 compensation -- but even with the hourly professionals, as
23 indicated, we believe that the cost of being retained should be
24 borne by the professional.

25 Many times, Your Honor, especially in the large cases,

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1 you have complex issues. And some of those complexities and
2 conflicts arise because of the nature of the professionals
3 themselves. It's not the bankruptcy per se, but the nature of
4 their relationships to other parties and so forth. And if they
5 undertake to be retained under that circumstance, it seems only
6 fair that they should bear the cost, and not the estate. It's
7 not the estate that has established those connections, it's the
8 professionals.

9 And so whatever is unique to that professional -- if a
10 professional comes in with no conflicts at all, there should be
11 very little cost to that professional and presumptively to the
12 estate, if the estate bears the cost. So from our standpoint,
13 it should be, for all professionals, hourly or not, a matter of
14 their costs.

15 MR. MARINUZZI: Your Honor --

16 THE COURT: Go ahead, Mr. Marinuzzi.

17 MR. MARINUZZI: -- if I could just respond to that? I
18 also, obviously, read the Borders decision. And what I took
19 away from it on the overhead issue is that it wasn't overhead
20 for Mercer, as the Court ruled last time, notwithstanding the
21 context. I don't know that it made a difference whether the
22 objection was asserted at the beginning or the end, for
23 purposes of determining whether these fees are overhead. And
24 Your Honor concluded it wasn't overhead for the same firm, less
25 than a year ago. I don't know that the fact that it's being

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1 asserted now versus at the fee application time changes that
2 conclusion. But obviously, it's Your Honor's decision.

3 THE COURT: Anybody else wish to be heard with respect
4 to the Mercer retention?

5 (Pause)

6 THE COURT: I'm going to approve the Mercer retention
7 application with the following caveats. I intend to review the
8 fees incurred, as will be with expenses, very carefully. So
9 because simply saying that fees in connection with retention
10 should be reimbursable expenses, I am very mindful of the issue
11 that Mr. Masumoto raises about conflicts. So where protracted
12 work is required in connection with retention, because of the
13 professional's connections and contacts and potential
14 conflicts, I might well disallow those fees.

15 There's no question that because bankruptcy requires a
16 retention application for professionals such as Mercer, and
17 that this is a legal context, and therefore it does seem
18 appropriate to the Court for them to use professionals in doing
19 so, I'm not categorically excluding reimbursement for those
20 expenses. It becomes a question of why don't they use their
21 own inside counsel for doing it versus outside counsel.
22 Mercer's been using outside counsel for it.

23 But when I review the fee application, I don't know at
24 this stage -- I know they've said it's approximately less than
25 6,000 dollars that's been incurred to date -- I don't know

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1 without looking at the detailed time entries what that 6,000
2 dollars was incurred for doing -- what did they do for that.

3 So if the Court subsequently determines that the
4 issues in a particular retention arose because of conflicts
5 issues, for example, I might well conclude no, that shouldn't
6 be a reimbursable expense. If the professional decides they
7 want this engagement and their other -- work for other clients
8 presents complications for them, and they're seeking advice
9 from counsel on that, I might well just disallow it. I'm not
10 categorically -- in saying I will approve the engagement that
11 includes reimbursement for their expenses in connection with
12 retention, that should not be taken as a categorical approval
13 of whatever shows up in a fee application.

14 And if the fee application is not sufficiently
15 revealing of what they did, I'm going to ask for more detail
16 about it. Okay? So that will be -- I will approve the
17 retention application.

18 I think, just so we're clear, the preparation of fee
19 applications, there, as I said in the Borders decision, subject
20 to reviewing the fees for reasonableness, I think that's
21 appropriate. And Mr. Masumoto's raised no question about the
22 indemnity issue. Okay.

23 MR. MARINUZZI: Thank you, Your Honor.

24 THE COURT: Thank you, Mr. Masumoto. Thank you, Mr.
25 Marinuzzi.

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1 MR. MARINUZZI: Thank you, Your Honor. Your Honor,
2 the last retention application on the calendar today is the
3 committee's application to retain counsel, Kramer Levin. I'd
4 cede the podium to Kramer Levin.

5 THE COURT: Is Rubenstein on?

6 MR. MARINUZZI: Oh, I apologize, I missed it. You're
7 right. Thank you. Your Honor, the last retention application
8 on the debtors' side is the debtors' application to retain
9 Rubenstein Associates as corporate communications consultants.
10 There was an objection by the U.S. Trustee regarding billing in
11 quarter hour increments, and they've decided to bill in tenths
12 of an hour increments to satisfy that objection.

13 THE COURT: And the Court noted that with respect to
14 the reimbursement for counsel fees, it did not include -- in
15 connection with retention -- it was essentially the indemnity.

16 MR. MARINUZZI: Indemnity, right.

17 THE COURT: Mr. Masumoto, anything that you want --

18 MR. MASUMOTO: No, thank you, Your Honor.

19 THE COURT: All right. That's approved.

20 MR. MARINUZZI: Thank you, Your Honor. And now I'll
21 cede the podium to Kramer Levin.

22 THE COURT: Okay.

23 MR. ECKSTEIN: Your Honor, good morning. Kenneth
24 Eckstein, Kramer Levin, proposed counsel for the creditors'
25 committee. I was hoping I could rely on Mr. Marinuzzi, but I

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1 guess I couldn't on this one, so I'll present it myself.

2 Your Honor, we submitted our retention application in
3 connection with our representation of the creditors' committee.
4 We reviewed it with the U.S. Trustee. We didn't receive any
5 objections. So unless Your Honor has any questions, we would
6 respectfully request approval of the motion.

7 THE COURT: Does anybody wish to be heard with respect
8 to the Kramer Levin retention application?

9 All right. It's approved as well.

10 MR. ECKSTEIN: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. LEE: Good morning, Your Honor. Gary Lee from
13 Morrison & Foerster, counsel for the debtors. I think I can
14 say that now, subject to the order. The last item, I think, on
15 the agenda, is the status conference on our motion for a final
16 order approving the servicing agreement between the debtors and
17 Ally Bank.

18 Your Honor, there have been very serious discussions
19 between the debtors, the committee, and Ally, regarding this
20 motion. And the parties have agreed that it would be the
21 professionally responsible thing to do to give the business
22 principals some time to talk here about the motion. It's an
23 important motion. I think, as we said, it's one of the
24 cornerstones of the entire case. And so in that regard, the
25 proposal, Your Honor, is, that the debtors will adjourn the

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1 status conference until July the 24th, and the hearing until
2 August the 8th.

3 The debtors are going to file a supplemental
4 declaration, Your Honor on Monday. We've shared a draft of
5 that declaration with the committee. And it will set out
6 further details regarding the motion and why it's a critical
7 component of the case.

8 We are working on a discovery schedule with the
9 committee. If there is a need for an evidentiary hearing on
10 August the 8th -- and in the meantime there have been informal
11 productions of documents. We've received a formal request, and
12 we're in the process of compiling that. So in the event there
13 is a hearing, nobody is caught by surprise and loses any time.

14 THE COURT: Mr. Lee, tell me, the anticipated schedule
15 is that it'll come before the Court when?

16 MR. LEE: On August the 8th.

17 THE COURT: And are you requesting that the August 8th
18 hearing be an evidentiary hearing if necessary?

19 MR. LEE: Your Honor, in the event that the parties
20 are unable to reach any kind of resolution -- and we hope to be
21 at a report on that by July the 24th -- the committee's
22 indicated that they believe the next hearing will need to be an
23 evidentiary hearing. The intend to call witnesses. And I
24 believe the debtors will need to do the same. So, yes, Your
25 Honor, if possible, August the 8th would be an evidentiary

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1 hearing.

2 THE COURT: I don't think so. Because I have MF
3 Global in the morning and the ResCap KEIP KERP motion --

4 MR. LEE: Which is also mine, Your Honor.

5 THE COURT: -- is scheduled for 2 o'clock. It's on
6 the calendar for 2 o'clock. I don't want to anticipate whether
7 the U.S. Trustee or the creditors' committee will object to the
8 KEIP KERP motion, but I haven't seen a KEIP or KERP that hasn't
9 been objected to -- I don't think ever, but --

10 MR. LEE: Well, Your Honor, we'll work very hard
11 between now and then to ensure that there aren't any. We've
12 actually had discussions with the committee regarding the KEIP
13 and KERP, and we are in the process of engaging with the U.S.
14 Trustee on that too. But you're right, it might be ambitious.

15 But for various reasons, Your Honor -- I apologize for
16 interrupting -- there are some fairly important reasons why it
17 can't slip much beyond August the 8th. The reason is because
18 the bank, which is the counterparty to this agreement, is a
19 regulated entity. And the FDIC is watching what we're doing
20 quite carefully and we wanted to get the --

21 THE COURT: Yes --

22 MR. LEE: -- I appreciate -- every regulator under the
23 sun is watching what we're doing quite carefully. But we are
24 under a certain amount of pressure to get the first hearing
25 date that we can.

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1 THE COURT: Well, I don't find that to be -- the fact
2 that the FDIC is keeping a close watch is not necessarily
3 persuasive of having an evidentiary hearing on it. Part of my
4 problem is that I'm out of town the week before. I'm committed
5 to always being prepared when I have a hearing in advance.

6 MR. LEE: I have had that experience, Your Honor, yes.

7 THE COURT: And so the question is, will the schedule
8 allow enough time for me to feel fully prepared. I'm not sure
9 if I can do that. I'm not asking you to give me a preview all
10 of the issues, but what issue do you -- if there has to be an
11 evidentiary hearing, what issues do you anticipate will require
12 an evidentiary hearing?

13 MR. LEE: I'm going to try and keep my comments
14 neutral, because the parties are engaged in --

15 THE COURT: I understand that.

16 MR. LEE: -- fairly sensitive negotiations. I think,
17 Your Honor, the principal issues --

18 THE COURT: Well, let me stop you for a second.

19 MR. LEE: Yes.

20 THE COURT: I don't want to do anything to upset --

21 MR. LEE: Thank you, Your Honor.

22 THE COURT: -- delicate discussions in an effort to
23 work this out.. You're going to be back here on July 24th?

24 MR. LEE: Yes, Your Honor.

25 THE COURT: We're going to put this on for a status

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1 conference on July 24th.

2 MR. LEE: Yes, Your Honor.

3 THE COURT: And at that time, I expect a fuller
4 discussion. And if necessary, we'll talk about exactly what
5 the Court requires if there's going to be an evidentiary
6 hearing, and what that will -- you're also on the calendar for
7 August 14th.

8 MR. LEE: Yes.

9 THE COURT: I don't know -- I mean I see a lot of
10 matters listed on the calendar for August 14th. There's a lot
11 of stay relief motions. I don't know if we will have them or
12 not it or not, or whether -- what those will entail.

13 So it's possible, Mr. Lee, that August 14th will be
14 the date for an evidentiary hearing. And if necessary, start
15 thinking now about which of the ResCap matters that are on the
16 calendar for August 14th can be moved. Right now there's
17 nothing on the calendar on August 14th other than lift stays.

18 MR. LEE: Your Honor, may I ask a quick question? Did
19 we have a holding date on the 9th, or has that gone already?

20 THE COURT: You're on the calendar for the 9th. You
21 have retention applications for Deloitte, KPMG, continued
22 hearing if necessary for KEIP and KERP.

23 MR. LEE: I hope not, Your Honor.

24 THE COURT: I didn't put these entries in there. I've
25 got Borders for the 10th.

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1 MR. LEE: Would it be possible, Your Honor, just to
2 tentatively set it for the 9th?

3 THE COURT: Well, it comes back --

4 MR. LEE: Or is that --

5 THE COURT: -- to the same problem.

6 MR. LEE: Okay.

7 THE COURT: How much preparation is going to be
8 required for me.

9 MR. LEE: I understand, Your Honor.

10 THE COURT: And I'm away the prior week. It's -- I'm
11 not -- let's talk about it on the 24th.

12 MR. LEE: Okay. And I'll commit, there'll be a full
13 preview of the issues on the 24th. We would have done it
14 today, but for the fact that the parties are engaged.

15 THE COURT: That's fine.

16 MR. LEE: Thank you.

17 THE COURT: I don't want to upset discussions that are
18 constructive discussions.

19 Just, ordinarily, Mr. Lee, on anything that's a
20 contested matter requiring an evidentiary hearing that's at all
21 complicated, I want papers a week in advance.

22 MR. LEE: I see.

23 THE COURT: And that may be possible for you, but I
24 won't be here for -- I'll be here for part of the week, but not
25 all of the week. And it limits my preparation.

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1 MR. LEE: And I can guarantee it will be complicated,
2 so.

3 THE COURT: We'll see on the 24th.

4 MR. LEE: Okay, thank you, Your Honor.

5 THE COURT: Thank you. Mr. Eckstein?

6 MR. ECKSTEIN: Your Honor, Kenneth Eckstein, of Kramer
7 Levin, counsel for the creditors' committee. I'm going to
8 begin by concurring with Mr. Lee that this will be complicated.
9 And I think it will be --

10 THE COURT: Sufficiently complicated that if there's
11 an evidentiary hearing, it's going to be more than one day?

12 MR. ECKSTEIN: Potentially, yes. I think that in the
13 first instance, we concur with the judgment to adjourn today's
14 status conference. There were fairly significant discussions
15 that took place this week among the professionals about this
16 motion. And I think all parties have concurred that it would
17 be appropriate for the principals to meet.

18 THE COURT: And I'm not pressing the issue --

19 MR. ECKSTEIN: I understand. I do think, Your Honor,
20 that there are issues about this motion that do require
21 significant additional disclosure. And we have been assured by
22 Mr. Lee that a significant additional submission is going to be
23 made, which we think will be very important, and obviously
24 would be something that all parties are going to want to react
25 to. And I think that would also justify adjourning the motion.

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1 The issue does go to the heart of the relationships
2 between ResCap and Ally and the operations of the business and
3 what is and is not appropriate in terms of payments during the
4 Chapter 11 case, in contrast to what might be appropriate to be
5 dealt with in connection with a plan, both in terms of pre-
6 petition obligations and post-petition obligations and how
7 those should be allocated.

8 We think it would be useful if we can bring to the
9 Court a resolution. We think that would be worthwhile to
10 pursue. We think that we should use the 24th as a date to
11 review the issues. And I think that that could advance the
12 ball quite significantly, because I think Your Honor will hear
13 the issues. And my sense is that without an evidentiary
14 hearing we can probably frame a lot of the factual issues,
15 which are, I think, more important in many respects, and more
16 difficult than the legal issues. I think the legal issues are
17 important, obviously, but I don't think that's where the big
18 controversy and complexity arises.

19 So I think using the 24th will allow everybody to
20 assess what is necessary. And there's obviously a real
21 possibility that by the 24th we'll have made business progress.
22 And I imagine if we can make progress, maybe we'll be able to
23 arrange to submit an order earlier and get the matter resolved
24 without the need for a lengthy and contentious hearing.

25 But at this point, I think, we're prepared to proceed

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1 along the lines of let's have the discussions. They're going
2 to be scheduled for next week. And I think, for now, it would
3 probably be useful if we could use a response holding date for
4 either August 1st or August 2nd, which would be a week in
5 advance of August 8th or August 9th, which is what we were
6 anticipating. I think the intention was to work out a
7 discovery schedule with Mr. Lee, which I imagine we'll have in
8 place, certainly before the 24th. We haven't had any problems
9 in working out discovery. And we can bring back the specific
10 issues to Your Honor on the 24th, depending upon where the
11 matter stands.

12 THE COURT: Okay. Let's see where things stand on the
13 24th. Okay?

14 MR. ECKSTEIN: Thank you.

15 THE COURT: Thank you, Mr. Eckstein.

16 Mr. Marinuzzi? I'm sorry. Go ahead, Mr. Lee.

17 MR. LEE: Apologies, Your Honor. Just one additional
18 point. Gary Lee from Morrison & Foerster. Ally has agreed to
19 extend the provision in the DIP that would otherwise
20 automatically default by virtue of the fact that we won't have
21 gotten approval for this agreement by, I believe it's the end
22 of the month. So we're able to carry over. I just wanted to
23 bring that to the Court's attention, that they've agreed to
24 work with us on that, too.

25 THE COURT: Thank you, Mr. Lee.

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1 MR. LEE: Thank you.

2 THE COURT: All right. Anything else, anybody wants
3 to raise? Mr. Marinuzzi?

4 MR. LEE: No, Your Honor. Thank you very much, again.

5 THE COURT: All right. We're adjourned. Thank you
6 very much. Everybody have a good weekend.

7 (Whereupon these proceedings were concluded at 11:04 AM)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D-569

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New York, NY 10040

Date: July 16, 2012

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EXHIBIT 2

**Transcript of Record at 13-16, 39-40, *In re Residential Capital LLC, et al.*, No. 12-12020
(July 3, 2013)**

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UNITED STATES BANKRUPTCY COURT

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SOUTHERN DISTRICT OF NEW YORK

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Case No. 12-12020-mg

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In the Matter of:

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RESIDENTIAL CAPITAL, LLC, et al.,

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Debtors.

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- - - - -x

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United States Bankruptcy Court

15

One Bowling Green

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New York, New York

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July 3, 2013

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10:02 AM

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B E F O R E:

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HON. MARTIN GLENN

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U.S. BANKRUPTCY JUDGE

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2 **Status conference**

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1 P R O C E E D I N G S

2 THE COURT: All right. Please be seated.

3 We are in Residential Capital number 12-12020 and also
4 in connection with two adversary proceedings, 13-01343 and 13-
5 01277.

6 Mr. Lee.

7 MR. LEE: Good morning, Your Honor. Gary Lee from
8 Morrison and Foerster for the debtors.

9 THE COURT: Let me just say before you proceed, this
10 is on the record. Go ahead.

11 MR. LEE: Thank you, Your Honor. And thank you for
12 seeing us on short notice.

13 Your Honor, I just want to be clear from the outset
14 that this is not about discovery. There is a telephonic
15 conference scheduled for next Tuesday.

16 THE COURT: Well, I'll tell you now, that conference
17 is going to be in court rather than on the telephone. Mr.
18 Walper, who is in California, can participate by telephone, but
19 we're going to -- I want everybody here at 5 o'clock.

20 MR. LEE: Thank you, Your Honor.

21 What this is about, Your Honor, is getting Your
22 Honor's guidance on how we should respond to the noteholders'
23 attempts, second round, third round, to raise plan issues in
24 the context of the adversary proceeding.

25 Your Honor, there are three things I want to address.

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1 First, we think Your Honor was abundantly clear at the last
2 status conference that the adversary proceeding related to
3 nonplan issues. We believe, and I'll go through this in some
4 more detail, that the noteholders ignores that direction.
5 Second, just to cut through some of the letter writing or at
6 least the three letters, we're not here to prejudice any
7 confirmation objections they can conjure up. We'll be
8 absolutely clear about that. Third, we do believe that the
9 notion of interdebtor conflicts was revolved when Your Honor
10 approved the plan support agreement. And if I may, Your Honor,
11 I'd like to go through those three points in a little bit more
12 detail.

13 Later today, we will be filing a plan and disclosure
14 statement. It's a plan that has the support of creditors with
15 claims throughout the debtor's capital structure, and we expect
16 overwhelming support for that plan from impaired creditors at
17 the principal debtors. The plan embodies a number of
18 compromises, the product of Judge Peck's mediation, and one of
19 those compromises relates to intercompany claims. For the
20 noteholders, Your Honor, this case -- because we're paying them
21 post -- sorry -- we're paying them par plus accrued, this case
22 now comes down to one issue, post-petition interest and post-
23 petition interest alone.

24 The reason we requested this status conference, Your
25 Honor, is to seek some direction on how and to what extent the

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1 noteholders are going to be able to disrupt the schedule set by
2 Your Honor in relation to the consolidated adversary
3 proceeding. And Your Honor suggested that we would -- should
4 come back to the court, that we shouldn't let these sorts of
5 issues fester, so that's why we're here.

6 We provided Your Honor with a copy of the junior
7 secured noteholders' letter which comes out of a unsuccessful
8 playbook that we've seen in other cases pending and resolved in
9 the southern district of New York. Refer Your Honor to Charter
10 and Adelphia.

11 Now, as I said, Your Honor was abundantly clear during
12 the chambers conference on scheduling that the allowable scope
13 of the adversary proceeding was nonplan matters. I don't know
14 if Your Honor has seen a copy of the junior secured
15 noteholders' counterclaims that were filed, I believe, this
16 week -- or last week. I think they speak for themselves as to
17 where the junior secured noteholders intend to go with the
18 adversary proceeding. Somebody on the noteholder side decided
19 to ignore Your Honor's direction because something like over a
20 dozen of the declarations sought by the counterclaims relate to
21 the global settlement that's embodied in the plan support
22 agreement and will be embodied in the plan.

23 And although I don't intend to address discovery
24 matters, and I didn't have enough time to actually go through
25 the 247 document requests we received, I just note for the

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1 record that ten alone go to the ability of the debtors to
2 resolve intercompany claims. So just to give you a flavor of
3 the counterclaims, Your Honor, ten of them seek a determination
4 of the exact distributable value of each of the intercompany
5 claims. That, Your Honor, is a plan issue because the
6 intercompany claims have been settled as part of the plan.

7 Second, Your Honor, several more seek to subordinate
8 the RMBS trustee claims, the monoline claims, and the
9 securities claims. Again, Your Honor, the exact claims that
10 are resolved as part of the plan. And there's something more
11 to this playbook as well, Your Honor. The junior secured
12 noteholders also objected to the FGIC settlement that resolves
13 the FGIC and the trustee's claims. Now, they're free to do so,
14 and we'll address that at the appropriate time, but I just,
15 again, note for the record that that 9019 settlement addresses
16 not the plan or the plan-related issues but rather settles
17 nearly ten billion dollars of claims, the claims totally 596
18 million dollar split between two debtors. And I can't fathom
19 why anybody would object to that.

20 Your Honor, we're not asking you for anything new
21 here. Your Honor was very clear to Mr. Uzzi what the adversary
22 proceeding will cover, and I don't think that message has come
23 through.

24 The other part of the playbook, which I think was
25 particularly disconcerting to the debtors because it came the

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1 same day Your Honor approved the plan support agreement, is the
2 attack on the process run by Judge Peck, the attack on Mr.
3 Kruger and on us as counsel. And we made it very clear when we
4 sought Judge Peck's appointment as mediator that one of the
5 things he would mediate was going to be intercompany claims.
6 The junior secured noteholders refused to participate in that
7 mediation based on the rules Judge Peck set. Those are not
8 rules that the debtor set. We also made it clear in the
9 application to appoint Mr. Kruger as the CRO that he would
10 assist in resolving interdebtor and intercreditor disputes and
11 that he was vested with authority to make decisions on behalf
12 of each debtor.

13 So, Your Honor, we think it's totally unfair fourteen
14 months into this case after Your Honor approved the plan
15 support agreement as being in the best interest of each of the
16 debtors, after we agreed to pay the junior secured noteholders
17 par plus accrued, after we agreed to pay post-petition interest
18 if they prevail in the adversary for them to take this tack.
19 I've just come back from England, Your Honor, and the
20 expression is, "it just isn't cricket."

21 They can attack the transactions embodied in the plan.
22 We've given them that right. It's been reserved. They can
23 attack good faith at confirmation if they want to. We are not
24 going to, nor do we believe we can prejudice their confirmation
25 objections. What they can't do, Your Honor, is create

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1 interdebtor conflicts or disagreements where there are none and
2 make those part of the adversary proceeding. Again, Your
3 Honor, that's beyond what you told them. The adversary
4 proceeding relates to the junior secured note issues and not
5 the plan.

6 So what we're asking Your Honor for is for some
7 direction and perhaps repeat direction with respect to two
8 matters. First, that allegations regarding conflicts have no
9 part of the adversary proceeding. If the junior secured
10 noteholders insist on challenging the bona fides of plan
11 settlements under 9019, they can do so at confirmation, but the
12 notion of interdebtor conflicts went out the window when the
13 plan support agreement was approved.

14 Second, Your Honor, that issues that are at the core
15 of the global settlement, the priority of claims, the amount of
16 claims, the intercompany settlement, the AFI settlement
17 allocation are exactly those things, plan issues. Your Honor
18 said it once, but it doesn't appear to have taken. They're not
19 part of the adversary proceeding.

20 Your Honor, our view is that it will defeat the entire
21 purpose of the mediation if we have to litigate those issues
22 outside of a plan.

23 THE COURT: Thank you, Mr. Lee.

24 MR. LEE: Thank you.

25 THE COURT: Mr. Shore.

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1 MR. SHORE: Yes, Your Honor, Chris Shore from White &
2 Case on behalf of the Ad Hoc Group.

3 Let me state at the outset as set forth in the letter
4 that got sent to you either late last night or early this
5 morning, we object to the setting on this kind of notice and on
6 the circumstances under which it arose, and in particular now,
7 since what Mr. Lee said is the letter which pertains to
8 discovery issues really isn't doubt discovery issues at all but
9 rather is an open-ended request for this Court's guidance on
10 how to deal with issues. I'm not going to address the
11 extraneous issues in the letter or what were said today with
12 respect to the mediation or the discovery. We'll handle those
13 either in the mediation or in the discovery conference unless
14 Your Honor wants to hear from me on that.

15 Fundamentally, the issue in this case arises out of
16 the debtor's very demonstrable shift in positions with respect
17 to what they're doing with respect to interdebtor conflicts in
18 these cases. They started out saying that it's all going to be
19 proposed for a settlement. Then they came back and said, well,
20 it's not being proposed for a settlement, it's being -- we've
21 determined that they have no mathematical value. Then they
22 came back and said, actually, what we want to do -- and this
23 was the statement that was made on the report at the PSA
24 hearing and in their PSA reply -- what we intend to do is to
25 waive intercompany claims based upon a legal determination

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1 that's been made that those claims have no merit. We had a
2 call --

3 THE COURT: What they've said, I bought, was that they
4 propose a settlement which must be approved under 9019 and plan
5 confirmation standards that would value the intercompany claims
6 at zero, but it's a settlement, it's not a determination --
7 it's -- a settlement is a compromise.

8 MR. SHORE: We thought as much as well, Your Honor,
9 and that's where the problem lies. We can all have our views
10 as to whether a plan which throws up interdebtor conflicts in
11 the air and says you all creditors resolve it makes sense. I
12 happen to think that it just takes the fiduciary out of the
13 seat, but that's a process which works. That's not what the
14 debtors are proposing, Your Honor. That's what they had
15 proposed. And then we went to them and said first, there's a
16 problem with a settlement like this, you're settling everything
17 at zero, their -- please explain to us how, when you have one
18 intercompany claim is at 2.6 billion dollars running from one
19 debtor to another, that gets settled at zero, same with a 35
20 million dollar claim that runs from this debtor. They didn't
21 have an answer to that and --

22 THE COURT: Well, the time -- the time for the answers
23 to those questions will be when the Court considers the
24 settlements -- if the Court gets to that point of considering
25 the settlements embodied in the plan. It's not today. I

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1 understand your views --

2 MR. SHORE: Um-hum.

3 THE COURT: -- and I understand the views of the
4 debtor -- debtors. That's not today's issue.

5 MR. SHORE: I didn't -- I didn't make it today's
6 issue, Your Honor. What they're saying is that this issue is
7 not going to be litigated, and let me respond to that in two
8 respects.

9 First, the notion that this got resolved in the PSA is
10 contrary to everything in the record on that PSA. As we set
11 forth in our supplemental response, the first time they said,
12 we're seeking to waive intercompany claims because we believe
13 they have no value, we called them up immediately -- and this
14 is in the supplemental response -- and said, you don't really
15 mean that, do you, that you're making a determination that
16 these claims have no legal merit? They said, no, we're not,
17 we're just saying that the math doesn't work, that the math
18 doesn't provide value. That's why we filed the supplemental
19 response.

20 But in that, we said we preserve all rights with
21 respect to this, and there were statements made on the record,
22 we're concerned that what the debtors are doing here is losing
23 any sensitivity to the issue of how to handle interdebtor
24 conflicts. You want to propose it for a settlement, fine, but
25 you can't come in as an advocate and say, on behalf of one

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1 client, these intercompany claims are good, those enter company
2 claims are bad. You also can't say, in between the clients,
3 this is how we think the Ally settlement should be allocated.
4 You can't do what they want to do on another interdebtor
5 conflict, which is how to allocate expense and push all the
6 expense of these cases down OpCo's --

7 THE COURT: Are you suggesting, Mr. Lee, that the
8 debtor unilaterally decided those issues or that those were
9 issues that at this stage were resolved among the parties to
10 the PSA? It's not -- this is not a debtor-only issue. The two
11 term sheets that are attached to the PSA, which the Court has
12 approved the PSA at least as to those parties who've signed the
13 PSA, they've agreed to support a plan consistent with the term
14 set forth in the two term sheets.

15 So I've seen nothing to suggest that those were
16 unilateral decisions by the debtor or the CRO. Whether they
17 get approved by the Court is a different issue, but you make it
18 sound as if the debtor unilaterally decided how those issues
19 would be resolved.

20 MR. SHORE: I --

21 THE COURT: It doesn't appear to the Court to be that
22 way.

23 MR. SHORE: Okay. Well, then maybe we can get a --
24 we'll certainly get --

25 THE COURT: Well, just address me. Don't --

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1 MR. SHORE: Sure.

2 THE COURT: Don't address questions to --

3 MR. SHORE: No, I'm saying I think we're going to get
4 an answer, a definitive answer, from the debtors on how they're
5 dealing with these intercompany claims in the context of the
6 plan and disclosure statement that are going to be filed, which
7 is why I didn't want to have this proceeding today. We will
8 get the definitive view.

9 My point is, it sure sounds to us like what the
10 debtors want to do, to avoid an issue that we raised with
11 respect to adequate protection, is say the reason the
12 settlement works and the reason the Court can approve the
13 settlement is because the debtors have already determined,
14 based upon Mr. Kruger's negotiation with himself, and advice by
15 Morrison & Foerster, that all the intercompany claims are
16 without legal merit. If that's the position they're taking,
17 that, I think, is going to be a surprise to Your Honor and it's
18 going to meet with questions from me, which is, how do you plan
19 to do that, which was the purpose of the letter. We still have
20 not gotten a response.

21 If Mr. Lee stands up and says there's nothing about
22 our plan which will seek a determination from this Court that
23 our waiver of intercompany claims in connection with the
24 settlement was supportable by the law and by legal
25 determination of the respective rights and obligations of our

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1 many debtors, that's one thing. That's not what they're
2 saying.

3 THE COURT: Well, I guess we can all -- you can spend
4 your weekend reading the plan and disclosure statement.

5 MR. SHORE: Now, with respect to the counterclaims and
6 the injection of issues in this case, as Your Honor pointed out
7 on the PSA, there is no plan on file. The debtors requested,
8 and Your Honor ordered, that we file our answer and
9 counterclaims with respect to all issues relating to the
10 allowance of post-petition interest. There is no --

11 THE COURT: Let me see if I can put this aspect of it
12 to rest, okay? I don't view anything that this Court has done,
13 or the order that was entered approving the PSA, or what
14 occurred at any prior conference in the court, as limiting the
15 JSNs as to what would be an appropriate pleading, what would be
16 an appropriate counterclaim under applicable Federal Rules of
17 Civil Procedure. They can and should and did assert claims
18 that they believe are supported by the facts and the law.
19 Whether that's true or not, we'll see. Approval of the PSA, to
20 which the JSNs were not parties, cannot alter the JSN's rights.

21 With that said, however, not all issues necessarily
22 raised by the counterclaims need to be resolved at one time.
23 And what I've been clear about and what I want to be clear
24 about is that I intend -- I think I referred to it as the phase
25 one trial, the trial of the issues -- well, of issues, we'll

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1 say, not the issues -- of issues with respect to the JSNs, the
2 extent the issues are included within the 9019 that's going to
3 be embodied in the plan. It seems to me that those will be
4 heard, tried, to the extent they're contested, in the
5 confirmation hearing.

6 Specifically, this issue of valuing intercompany
7 claims at zero, it's an issue that affects many creditor
8 constituencies, not just the JSNs. And I don't intend to hear
9 or resolve the evidence or arguments with respect to that issue
10 at a trial of the adversary proceedings.

11 To the extent that the JSNs raise issues in their
12 counterclaims that the debtors believe -- and we'll see whether
13 the parties can agree on this or not -- that are what the
14 debtor describes as plan confirmation issues, they can be
15 bifurcated from the issues that'll be tried. I mean, this is
16 not -- I mean, the procedures are pretty clear about this. I
17 have great discretion about what issues -- if I bifurcate here
18 and resolve particular issues, I can do that, and I will do
19 that. To the extent that issues raised by the JSNs are covered
20 by the 9019, I'll go ahead and hear and decide it.

21 I mean, you know, the proponents of the plan --
22 proponents of the 9019 settlement, have a larger hurdle when
23 the objectors are not part -- claim that a settlement is
24 improperly affecting their rights. But certainly there is
25 authority for a court to go ahead and approve it, unless

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1 there's an agreement with the JSNs, and if they oppose plan
2 confirmation, and if they oppose the global settlement with
3 respect to intercompany claims, I'm going to have to hear the
4 evidence and decide it as part of plan confirmation, and I
5 will.

6 And to the extent they raise those issues, if properly
7 raised -- I don't believe, Mr. Lee, that anything I've said
8 from the bench or any order I've entered, including the order
9 approving the PSA, has affected, substantively, the rights of
10 the JSNs. Okay. So did they have to assert them? Is this
11 compulsory counterclaims that they had to assert? I'm not
12 going to get into that. I don't know. I'll tell you right
13 now, I haven't read the most recent round of pleadings, okay?
14 It may well be their position is that these are compulsory
15 counterclaims and they had to assert them. And fine, so
16 they've asserted them. Okay.

17 So anything else you want to add?

18 MR. SHORE: Yeah, let me just respond to that last
19 piece, to make our position clear on this. We heard Your Honor
20 loud and clear with respect to affecting rights of the others.
21 We have offered multiple mechanisms, procedural mechanisms for
22 handling our issues, independent of any issues that relate to
23 the global settlement or other parties. That's just been
24 soundly rejected. We're still trying to work through that.

25 Second, our counterclaims, actually, what we're trying

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1 to do is, independent of the global settlement, there are
2 issues that have to be resolved. For example, if they want to
3 settle the inter -- intercompany claims are our collateral;
4 there's no dispute about that. If they want to settle those
5 claims at zero, they can do that --

6 THE COURT: Well, when you say that's part of your
7 collateral, what I had understood your position to be is, for
8 example, you have a pledge of the equity of various ResCap
9 affiliates, and your position is if they have -- if they are
10 creditors on a substantial intercompany claim, that would
11 make -- which it paid in full or in substantial part, would
12 make that entity solvent, such that the equity had value. You
13 claim you have the equity as part of your collateral package.
14 Do I understand that correctly?

15 MR. SHORE: That's one issue. The other issue is
16 intercompany claims. So for example, RFC has a two billion
17 dollar claim scheduled -- plus billion dollar claim into
18 ResCap, LLC, which is pursuant to a notes agreement. If value
19 flows, that is, if the 2.6 billion dollar claim is --

20 THE COURT: May I ask you this? Do you have a pledge
21 specifically of that intercompany claim or --

22 MR. SHORE: Yes, on that one, we have various pledges
23 that -- or sorry, various grants --

24 THE COURT: You have a pledge --

25 MR. SHORE: -- of security interests.

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1 THE COURT: -- of a note?

2 MR. SHORE: We do not. We have a lien on the general
3 intangible of RFC. If value flows on that -- and this is a
4 stipulated lien at this point; the debtors have agreed to it
5 and the committee is estopped, at this point, because they
6 didn't challenge it. If value flows on that, so let's say the
7 two billion dollar claim gets paid at ten cents on the dollar
8 at ResCap, LLC, 200 million dollars flows, subject to our lien.
9 What they're doing here is they're saying there are no
10 intercompany claims.

11 THE COURT: Oh, I understand what they're doing --

12 MR. SHORE: Right.

13 THE COURT: -- Mr. --

14 MR. SHORE: So --

15 THE COURT: -- Mr. Shore.

16 MR. SHORE: So those are the counterclaims. So let's
17 say they want to settle that claim at zero. If Your Honor
18 determines, though, that that collateral was worth 200 million
19 dollars, we have a diminution in value, because the debtors
20 have disposed of the collateral of 200 million dollars.

21 THE COURT: Well, if I determine that there are
22 disputed issues as to whether debt should be recharacterized as
23 equity, for example, and they've settled that issue, I don't --
24 what is it that says it can't be settled without your consent
25 or agreement?

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1 MR. SHORE: There's nothing that says it can't be
2 settled --

3 THE COURT: Right.

4 MR. SHORE: -- without --

5 THE COURT: And so what the issue for the 9019 is:
6 Does the settlement pass muster? It may or it may not.

7 MR. SHORE: Right. There are two issues --

8 THE COURT: But that's not an issue for this phase one
9 trial.

10 MR. SHORE: There are two issues there. First of all,
11 the RFC one we understand. There are other debtors there who
12 are not represented, even virtually, by any creditors who are
13 part of that negotiation. So the notion that the OpCos below
14 waive their intercompany claims into the parent, as approved by
15 everybody who's sitting at those top levels, I think is one of
16 the problems with the 9019. But more importantly --

17 THE COURT: You'll attack it; if that's what you
18 believe --

19 MR. SHORE: Right.

20 THE COURT: -- that's what you'll -- you'll make that
21 argument.

22 MR. SHORE: Even if it's settled, though, even if it's
23 settled at zero, if Your Honor says that the claims, the
24 particular claims had value but were settled at zero --

25 THE COURT: Okay.

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1 MR. SHORE: -- as part of the --

2 THE COURT: Mr. Shore?

3 MR. SHORE: -- global compromise --

4 THE COURT: How can I make this any clearer? I said
5 it at the prior hearings. This one's on the record; you can
6 get a transcript. Okay? If you have objections to plan
7 confirmation, if you have an objection to the settlements that
8 will be embodied in the plan, you will file your objection, and
9 I will hear them then. Because the issue of the interdebtor
10 claims affects many constituencies, okay, they all have a right
11 to be heard, either in support of the settlement or in
12 opposition to the settlement. Okay?

13 MR. SHORE: And as a matter --

14 THE COURT: And I plan to do that as part of the plan
15 confirmation, okay? I've said it before; it may have been on
16 the transcript before. Some of these hearings on scheduling
17 have not been on the record. I wanted this one on the record,
18 okay? You can order a transcript. Okay. Anything else you
19 want to say?

20 MR. SHORE: Only this. We have a procedure set in
21 place. We have counterclaims that are filed in the adversary.
22 They have a time to respond to those. I assume that what
23 they're going to do, after we see the plan and disclosure
24 statement, is move to have the Court abstain from hearing these
25 twelve --

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1 THE COURT: I don't think it's an abstention. It's
2 not an abstention, I'm telling you. It may be that I will
3 bifurcate the issues.

4 MR. SHORE: That may be another proposal as to how
5 they plan on dealing with it, which is bifurcating the issues.
6 That's fine. But we need to have some procedure that sets in
7 place as to exactly --

8 THE COURT: Okay. I'm going to --

9 MR. SHORE: -- what's happening.

10 THE COURT: That is what I'm going to give some
11 guidance about. Anything else you want to add, Mr. Shore?

12 MR. SHORE: Nothing, Your Honor.

13 THE COURT: All right. Anybody else want to be heard?
14 Mr. Golden?

15 MR. GOLDEN: Your Honor, UMB, as the indenture trustee
16 for all the junior secured noteholders, has heard the Court
17 loud and clear. We understand, always understood, that it was
18 the intention of this Court to handle the settlement of the
19 intercompany claims as part of the global settlement in
20 connection with the plan process. We don't have a problem with
21 that, per se. But the debtor, in its adversary proceeding, in
22 its amended adversary proceeding, specifically Count 5 of that
23 adversary proceeding, puts into direct issue those intercompany
24 claims. Count 5, paraphrasing, says they want a declaration
25 that the junior secured noteholders are undersecured.

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1 Everybody here understands undersecured; the value of the
2 collateral is less than the amount of the claim.

3 Now, leaving aside the shaky legal proposition that
4 they're asserting, and we'll get to that in due course, that
5 claim, that count requires the junior secured noteholders and
6 UMB, as the fiduciary, to defend against that. It is nobody --
7 it's not going to come as a surprise to anybody that a large
8 part of the collateral that the junior secured noteholders
9 assert they had are the intercompany claims. And --

10 THE COURT: You don't have a pledge of the
11 intercompany claims, do you?

12 MR. GOLDEN: Your --

13 THE COURT: Show me a piece of paper that says you
14 have a -- that your collateral specifically includes the
15 intercompany claims. I've never understood that to be the
16 case. You may -- Mr. Shore raises an issue about a pledge of
17 intangibles. It may cover it; it may not cover. Those as to
18 which you have a pledge of the equity of subsidiaries or
19 affiliates, if they're solvent, if the intercompany -- if
20 payment on the intercompany claims would mean they're solvent,
21 then there's value for you if you have a pledge of the equity.

22 But do you have a piece of paper that is a pledge of a
23 note or another piece of paper that reflects an intercompany
24 claim?

25 MR. GOLDEN: As Mr. Shore explained, Your Honor, we

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1 don't. But it is --

2 THE COURT: Okay.

3 MR. GOLDEN: But it is our position --

4 THE COURT: I understand your position --

5 MR. GOLDEN: Okay.

6 THE COURT: -- Mr. Golden.

7 MR. GOLDEN: So having that as our position, we need
8 to defend against Count V which says we're undersecured.

9 THE COURT: And the -- well, my understanding is they
10 claim you're undersecured, for a whole variety of reasons. And
11 it may be that, in trying this first phase and this -- the
12 adversary, all issues aren't going to be resolved, because I
13 understand your point about if intercompany claims are not
14 valued at zero, you believe that that's enough for you to win.
15 And it may be that -- say RFC -- what, two billion dollars,
16 same intercompany claim -- I don't know what the -- what
17 creditor claims have been filed against RFC.

18 I mean, you may be able to deal with this issue --
19 we'll talk a little bit about discovery and trial even at
20 confirmation -- with a rifle shot and not a blunderbuss. If
21 you pick -- if you think that you've got -- that there are
22 three of the intercompany claims that you believe beyond
23 question are what they purport to be and there's no basis to
24 settle them at zero, you'll focus on those at trial and not
25 have to go through fifty-one affiliates and -- I'm not going to

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1 tell you right now -- I may tell you later but I'm not going to
2 tell you right now how the trial ought to proceed. Okay. But
3 what I am telling everybody -- and so -- look, you raise the
4 issue in counterclaims that -- and look, I'm telling you, I
5 didn't read them yet, okay? I will, okay? But I haven't
6 read -- I got a lot going on. I haven't read the latest round
7 of pleadings, okay? I will take you at your word and, I think,
8 Mr. Shore's word, that you've raised issues in counterclaims.
9 And again, I don't know whether they're compulsory or not. I
10 don't get particularly excited that you raised issues in the
11 counterclaims, that are going to ultimately get resolved as
12 part of a plan confirmation trial rather than this trial, okay?

13 What I want to avoid is -- if possible, is injecting
14 issues into this first trial that are going to necessarily
15 bring to the table every other creditor constituency, because
16 these are issues that apply across the board and not unique to
17 you. The same applies to the debtor: If they amended their
18 complaint and they added a Count V that you believe -- just a
19 count to say -- determine that you're undersecured, I don't
20 think is the problem, Mr. Golden. It may be, if there are
21 three reasons they think that certain collateral isn't part of
22 your collateral package, for example -- I don't see what
23 prevents the Court from resolving that issue, okay?

24 MR. GOLDEN: But they haven't pled it that way, Your
25 Honor.

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1 THE COURT: Well --

2 MR. GOLDEN: That's how the committee --

3 THE COURT: Good, and you didn't plead your
4 counterclaims in such a way as to exclude from the trial -- the
5 first-phase trial of the adversary proceedings, a range of
6 issues. That's fine. Okay. I -- we'll deal with it. I
7 understand your point.

8 Anything else? Any other point you have, Mr. Golden?

9 MR. GOLDEN: Well, Your Honor, I do want to point out
10 that, while we understand the process, we understand the
11 procedures, this is asking the JSNs basically to defend against
12 the debtor's lawsuit with its left hand tied behind its back.

13 If you allow me to continue, Your Honor.

14 We think -- I know it's a matter of dispute; we've
15 laid it out -- that we have a claim on the intercompany claims.

16 THE COURT: And you'll get a chance --

17 MR. GOLDEN: I --

18 THE COURT: Can you -- are you listening --

19 MR. GOLDEN: I am.

20 THE COURT: -- at all?

21 MR. GOLDEN: Your Honor --

22 THE COURT: Are you listening?

23 MR. GOLDEN: Your Honor, I am.

24 THE COURT: You'll get your chance to raise that
25 issue.

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1 MR. GOLDEN: I appreciate that, Your Honor. I'm --

2 THE COURT: You're not going to get a chance to raise
3 it in this phase-one trial, Mr. Golden.

4 MR. GOLDEN: I understand that, Your Honor. What I
5 wanted to point out is, if this was simply in a vacuum an
6 adversary proceeding brought by the debtors to determine
7 whether we're undersecured or not, we would assert all of our
8 defenses and there'd be a certain burden of proof on both
9 sides. Having manipulated the process --

10 THE COURT: Oh, come on --

11 MR. GOLDEN: Your Honor, can I --

12 THE COURT: -- Mr. Golden, spare me.

13 MR. GOLDEN: Okay. Your Honor, the 9019 has a much
14 different, as the Court is well aware, burden of proof --

15 THE COURT: Yes, and if they get it approved, then
16 you're going to come out on the short end, and what can I tell
17 you? We'll deal with that when I get to decide whether the
18 9019 gets approved. You don't try the merits of the issues on
19 a 9019. Okay, you don't have a mini-trial. The law in the
20 Second Circuit is quite clear on that. There's a very
21 different standard. You may not like it; that's the standard.

22 MR. GOLDEN: That's fine, Your Honor, and we are well
23 aware of that. But, for example, Your Honor, if we claimed we
24 had a truck as a piece of our collateral, and the debtor said,
25 as part of their plan process, they've determined, as a

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1 settlement, that there is no value in that truck --

2 THE COURT: You don't have a pledge. You told me
3 already you do not have a pledge of a note that reflects an
4 intercompany claim. Okay? You can't tie the hands of the
5 debtor in resolving all issues that relate to disputed issues
6 between all creditor constituencies and among all debtors. You
7 may not like that, but that's the way it goes, Mr. Golden.
8 You'll make those arguments at the time of plan confirmation,
9 and you may prevail on it and you may not. The debtors have --
10 the debtors are going to have a hard time -- a harder time when
11 it comes to a contested confirmation hearing over approval of
12 plan -- of settlements incorporated in the plan, as to which
13 you're not consenting creditors. But I'll deal with it then.

14 Anything else at this point?

15 MR. GOLDEN: No, sir.

16 THE COURT: Anybody else wish to be heard?

17 Mr. Eckstein.

18 MR. ECKSTEIN: Your Honor, good morning. Kenneth
19 Eckstein on behalf of the creditors' committee. I don't think
20 there's a lot more to say. I think the process, Your Honor, as
21 confirmed, is the process that we had understood was the way to
22 proceed. I think we need to make sure we appreciate that there
23 are many issues that we hear from the JSNs are -- need to be
24 resolved; and they believe, if they're resolved, it will
25 demonstrate that they were oversecured. And I believe that the

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1 adversary proceeding that's scheduled to be tried in October is
2 intended to deal with several issues, that have nothing to do
3 with intercompany claims, that we agree should be resolved.
4 And as we have said time and again, the plan will provide that,
5 in the event the Court rules that they are oversecured based
6 upon their theory, the plan will provide for them to receive
7 post-petition interest.

8 We wholeheartedly believe that the resolution of the
9 intercompany claims is not being done in a vacuum. The
10 resolution of the intercompany claims is being done in the
11 context of a global plan that pays the JSNs in full, in cash,
12 on the effective date of their pre-petition claim. That's very
13 important because what will become clear, I believe, at the
14 October trial is that, separate and apart from the AFI
15 settlement, all the other assets of the estate, even if the
16 JSNs' views of intercompany claims were given complete credit
17 the way they view them, the JSNs ultimately would not be
18 oversecured. But that's something the Court can hear, and we
19 can arm-wrestle over even that in connection with the trial.

20 But the resolution of the intercompany claims in the
21 plan, as the plan, the disclosure statement and the PSA all lay
22 out, is being done in the context of a resolution of a myriad
23 of issues in this case, including subs, the consolidation,
24 including the litigations over waivers of billions of dollars
25 of claims -- of intercompany claims that were on the books and

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1 have now been expunged, and all of the litigations that would
2 have to get dealt with absent the global settlement.

3 And the question will be whether or not -- in the
4 context of the plan where the JSNs are being paid in full their
5 entire pre-petition debt plus accrued pre-petition interest, is
6 the resolution reasonable. And that's something that the Court
7 can determine in connection with confirmation. And if we can't
8 resolve the matter between now and confirmation -- needless to
9 say, a contested confirmation is difficult, and -- but there's
10 no other way to deal with it; either we're going to resolve the
11 issues or we're going to deal with them at confirmation.

12 But I think it's important to make clear, number one,
13 that we're not going to litigate the intercompany claim dispute
14 in connection with the adversary proceeding, which I think that
15 is clear, and number two, we think it is important to confirm
16 that we're not going to have to constantly shadowbox with
17 suggestions that there are conflicts and that the debtor can't
18 proceed and the debtor's counsel can't proceed to deal with
19 confirmation. That was a suggestion that was raised in the
20 correspondence and, as I understood it, that's what provoked in
21 part the need for the conference was to eliminate the
22 suggestion that somehow there is a conflict that is overhanging
23 the debtor's ability to proceed.

24 The reality is, the PSA, as the JSNs know, has the
25 support of the constituencies of every debtor. We expect, and

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1 the plan contemplates, that the plan will have the support of
2 all of the unsecured creditors of each of the debtors. And the
3 JSNs are being paid in full. This is a case where there are no
4 debtor conflicts; and to suggest them, we think, is injecting
5 an improper --

6 THE COURT: Well, if the --

7 MR. ECKSTEIN: -- issue.

8 THE COURT: -- if the JSNs are entitled to post-
9 petition interest, they're not being paid in full.

10 MR. ECKSTEIN: But --

11 THE COURT: Okay, so we'll --

12 MR. ECKSTEIN: And that'll be provided for.

13 THE COURT: -- the Court'll decide it.

14 MR. ECKSTEIN: And that'll be provided for.

15 THE COURT: Okay. All right.

16 MR. ECKSTEIN: But I think that's what we just --

17 THE COURT: All right.

18 MR. ECKSTEIN: -- wanted to clarify.

19 THE COURT: Anything else -- anybody else want to be
20 heard?

21 MR. ECKSTEIN: Thank you, Your Honor.

22 THE COURT: Mr. Walper, do you want to be heard? You
23 got up early for this. Mr. Walper, are you on the phone?

24 MR. WALPER: Yes, I am, Your Honor. And I have
25 nothing to add. And thank you for your time.

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1 THE COURT: Okay. Mr. Shore, briefly.

2 MR. SHORE: Just hopefully something constructive,
3 Your Honor. We'll make a proposal for the debtors to deal with
4 the phase-one case --

5 THE COURT: I'm going to give you some very specific
6 instructions about how we're going to proceed.

7 MR. SHORE: Very good, Your Honor.

8 THE COURT: Okay? All right, the Court has reviewed:
9 the June 26th letter from Mr. Shore to Mr. Lee; the June 2nd
10 letter from Mr. Lee to the Court that attached the June 26
11 letter; and the July letter from Mr. Shore to the Court.
12 First, I don't intend to resolve any discovery disputes during
13 this conference. During this conference, which is on the
14 record -- I want -- I have explored briefly each side's view
15 about the issues that should be addressed in the phase-one
16 trial of the two adversary proceedings, and what should be
17 addressed during the plan confirmation hearing. As I said
18 before, I haven't had an opportunity to review the latest round
19 of pleadings yet.

20 What I previously stated at other hearings, and I
21 don't know whether there was a transcript, is that the phase-
22 one trial should deal with issues specific to the junior
23 secured noteholders, while the confirmation trial should
24 address issues relating to all creditor constituencies,
25 including the issues arising from the proposed global

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1 settlement in the plan term sheet but not yet reflected in the
2 plan, which is supposed to be filed this afternoon. That's my
3 desire about how to proceed. And I understand the devil may be
4 in the details. Also because of the compressed time frame in
5 which all this is occurring, I want to avoid duplication of
6 discovery in connection with the phase-one trial and the
7 confirmation hearing.

8 All right. The proposed global settlement included in
9 the plan term sheets will have to satisfy the Rule 9019
10 standards for approval of settlements as well as plan
11 confirmation standards. In connection with approval of a 9019
12 settlement, the Court does not try the merits of the issues
13 that have been settled. As a result, the discovery in
14 connection with a 9019 motion should not involve the same scope
15 of discovery as if issues were being tried on the merits.
16 Since no plan has yet been filed, it's premature to address the
17 details of the discovery plan in connection with a contested
18 plan confirmation hearing; that'll have to be addressed in the
19 first instance by the parties and, to the extent they can't
20 agree, by the Court.

21 With respect to a discovery plan for the adversary
22 proceedings, the parties need promptly to address a proposed
23 discovery plan to present to the Court. I've already set forth
24 a schedule in the case management and scheduling order that's
25 been entered. In connection with the discovery plan, I want

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1 the parties to negotiate -- this is -- and there're two things
2 I'm going to want from you all: I want you to negotiate a
3 statement of the issues to be adjudicated in the phase-one
4 trial. The issues for the phase-one trial should be issues
5 specific to the issues with the junior secured noteholders.
6 The interdebtor claims, as I said, will be part of the plan
7 confirmation hearing.

8 To the extent the parties cannot agree on a statement
9 of issues for the phase-one trial, the parties need to submit
10 counterstatements. Additionally, to the extent the parties
11 can't agree on a discovery plan for phase one, the parties
12 should submit proposed counterplans. All plans should be
13 consistent with the time schedule set forth in the Court's
14 prior case management order. The fact that issues have been
15 raised by counterclaims does not mean the issues will be part
16 of the phase-one trial. I can bifurcate, okay? Whether all
17 the counterclaims had to be asserted now, I don't know. Okay?
18 They have been asserted. That doesn't particularly trouble me.
19 The fact the debtors amended the adversary complaint to add
20 additional claims doesn't particularly trouble me. It doesn't
21 mean that those issues all get resolved as part of this phase-
22 one trial.

23 So you need, in the first instance, to try and
24 agree -- and I think this is where you were headed,
25 Mr. Shore -- to try and agree on the statement of the issues

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1 that are going to be resolved as part -- addressed and resolved
2 as part of the phase-one trial. And if you can't agree, you'll
3 submit counterstatements and I'll decide what's going to be
4 heard, so everybody's on the same page.

5 Okay. I want to impose a deadline for submitting the
6 statement of issues and a discovery plan. Rather than simply
7 picking a date -- and I have but I'm not going to give it -- I
8 want you to try and do that. I'm mindful of the fact we're on
9 a compressed time frame for the whole case. This is the 4th of
10 July Weekend. But in the first instance, why don't you see if
11 you can agree on when you can sit down, exchange drafts, see if
12 you can resolve the statement of issues.

13 Okay. Now, with respect to the exchange of views in
14 the correspondence regarding alleged conflicts, I don't intend
15 to address the issues in the absence of any properly filed
16 motions. But I find the length and tone of the correspondence
17 I've been receiving troubling. I don't intend to allow the
18 progress of this case to be slowed down by the exchange of six-
19 page single-spaced letters. Issues in this case will be
20 resolved on the merits. I don't intend to permit any party to
21 create a smokescreen or a sideshow that detracts from resolving
22 the issues in the case. If any party believes that counsel or
23 professionals should be disqualified or recused in whole or in
24 part, the parties will either resolve the issues consensually
25 now, or raise the issues with the Court in a properly filed

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1 motion. Because of the compressed time schedule, I'm prepared
2 to hear such motion on shortened notice.

3 If you sleep on your rights, you're going to lose
4 those rights. I don't plan to allow this issue to fester in
5 the case. So if you're going to raise them, Mr. Shore, you
6 better -- you've raised them already but, if you're going to --
7 if you really think that I should enter an order that recuses,
8 in whole or in part, the debtor's counsel or the CRO who was
9 appointed as an independent fiduciary not beholden to the
10 creditors of any particular one of the fifty-one debtors, go
11 ahead and make your motion, and do it quickly. And those who
12 are opposing it will respond.

13 The fact of the matter is that the proposed plan is
14 not solely being proposed by the debtors; it's also being
15 proposed by the committee. And I know you've taken your
16 potshots at the committee as well, Mr. Shore, in your
17 correspondence, but there are lots of creditor constituencies,
18 lots of folks who've signed on to the PSA reflecting many
19 different constituencies.

20 But, okay, the sniping has got to stop, okay? As far
21 as I'm concerned, for now, the debtor, it's business as usual,
22 Mr. Lee, for Mr. Kruger and Morrison & Foerster. If the junior
23 secured noteholders' counsel -- the ad hoc committee's counsel
24 is going to raise this issue, they better do it soon.

25 With respect to issues concerning the mediation,

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1 including the scope and content of any confidentiality
2 agreement order, as I've said before, this is a matter properly
3 raised with Judge Peck. I will not enter any order in
4 connection with the mediation that is not in form and substance
5 acceptable to him. All right? I indicated at the last
6 conference that I wanted to be able to speak with Judge Peck
7 regarding the proposed confidentiality order, the so-called
8 VITRA order that was submitted. I had a brief conversation
9 with Judge Peck about it; he made his views quite clear, and I
10 know he did so in the e-mail response that he -- I think was
11 circulated to all of you.

12 So I said, when I first appointed him as the mediator,
13 I was leaving those issues to him. And I believe, as a judge
14 sitting on this court, he's perfectly approp -- he is the
15 appropriate one to decide what confidentiality order should be
16 entered in connection with the mediation. I know in
17 Mr. Shore's reply from last night that he at least addresses
18 that some of the holders are -- of the junior secured notes,
19 are apparently prepared to participate in the mediation even if
20 it restricts their ability to trade. I'm not getting involved
21 in the issues regarding the mediation. Judge Peck is able and
22 willing to continue his role as a mediator. A lot's been
23 accomplished. Much more remains to be done.

24 Okay. The only other thing I said is that the
25 conference on the 9th, instead of being on the phone, I want it

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1 here. Ordinarily, as you know, I do discovery conferences on
2 the phone. Hopefully you will all resolve the discovery
3 disputes before then; today was not the time to do it. But I
4 did want to address the issues about -- to make clear what the
5 phase-one trial should encompass and what should be encompassed
6 within the confirmation hearing.

7 We're adjourned.

8 (Whereupon these proceedings were concluded at 10:51 AM)

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C E R T I F I C A T I O N

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I, David Rutt, certify that the foregoing transcript is a true
5 and accurate record of the proceedings.

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DAVID RUTT

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